TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 660

ELBERT B. LINDSEY AND E. R. LINDSEY,
PETITIONERS,

vs.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED JANUARY 16, 1937.

CERTIORARI GRANTED APRIL 5, 1937.

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[fol. a] [Caption omitted.]

[fol. 1]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 11046. (R. C. S. 2601-2)

STATE OF WASHINGTON, Plaintiff,

vs.

ELBERT B. LINDSEY and E. R. LINDSEY, Defendants

SECOND SUBSTITUTE INFORMATION—Filed September 4, 1935

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendants Elbert B. Lindsey and E. R. Lindsey, with the crime of Grand Larceny, committed as follows:

That the said defendants, Elbert B. Lindsey and E. R. Lindsey, in the County of Spokane, State of Washington, on or about the 15th day of April, 1935, then and there being, did then and there wilfully, unlawfully, feloniously and fraudulently, by color and aid of a check in words and figures as follows, to-wit:

"Spokane, Wash. Apl 15 1935. No. 2.

Spokane and Eastern Trust Company

Pay to the order of Elbert B. Lindsey, $40.00.
Forty 00 - - - - - - - Dollars. E. R. Lindsey."

and endorsed on the back thereof: "Elbert B. Lindsey, 1104 1-2 W. 2nd Ave., Co. Service National Guard."

obtain from Peter M. Jacoy Forty Dollars ($40.00) in money and currency of the United States of America, of the value of forty dollars, and the property of the said Peter M. Jacoy, with intent to deprive and defraud the said Peter M. Jacoy, the owner thereof, the said defendants then and there knowing that the maker and drawer of said check was not authorized or entitled to make or draw the same.

Ralph E. Foley, Prosecuting Attorney in and for Spokane County, Washington, by C. C. Quackenbush, Deputy.

State of Washington,
County of Spokane, ss:

C. C. Quackenbush, being first duly sworn on oath deposes and says; That the above and foregoing information is true, as he verily believes.

C. C. Quackenbush.

Subscribed and sworn to before me this 3d day of September, 1935. Nels Paulsen, Deputy County Clerk.

[File endorsement omitted.]

[fol. 2] [File endorsements omitted]

In Superior Court of Spokane County

No. 11046

[Title omitted]

Statement of Facts on Appeal to Supreme Court of Washington—Filed December 30, 1935; Filed in Spokane Court January 2, 1936

Honorable Chas. H. Leavy, Judge. (Trial record)
E. R. Lindsey, 1104 1-2 W. 2nd Avenue, Spokane, Wash., for appellants.
Ralph E. Foley, Esq., Pros. Atty. and C. C. Quackenbush, Esq., Deputy Attorneys for respondent.

Appeal from Spokane County, Wash.

Copy received Dec. 17, 1935, Prosecuting Attorney, Spokane County, Wash.

[fol. 3] In Superior Court of Spokane County
[Title omitted]

Notice of Statement of Facts

To the State of Washington and to Ralph E. Foley, Esq., Prosecuting Attorney for Spokane County, Washington:

You, and each of you will please take notice that the above named defendants, appellants, herewith serve upon

you a copy of their proposed Statement of Facts, to be used on appeal to the Supreme Court of the State of Washington, of the proceedings occurring at the trial of said cause, had before Hon. Chas. H. Leavy, Judge, and a jury, and that the original copy is being filed with the Clerk of the Superior Court for Spokane County, Washington, and that defendants, appellants, will, at the expiration of ten days from the date of service hereof, to-wit: on December 27, 1935, apply to the said Judge in his court room at Spokane, Washington to have the same settled and certified.

Done at Spokane, Washington, December 16, 1935.

E. R. Lindsey, For Defendants.

Received copy and service admitted this 16th day of December, 1925. ——, Prosecuting Attorney for Spokane County, Wash.

[fol. 4] In Superior Court of Spokane County

[Title omitted]

Statement of Facts

Be it Remembered, That heretofore and to-wit, on the 12th day of September, A. D., 1935, the above entitled cause came on for trial on the pleadings heretofore filed herein, before Honorable Chas. H. Leavy, Judge of the Superior Court for Spokane County, Washington, presiding, and a jury which was duly and regularly empaneled; the defendant Elbert B. Lindsey being present in person and by his counsel W. C. Donovan, Esq., and the defendant E. R. Lindsey being present and represented by his counsel Ralph E. Carlson, Esq., and the defendant E. R. Lindsey announced himself ready for trial, and the defendant Elbert B. Lindsey objecting to proceeding with the trial by reason of the fact that he was unable to employ counsel and that counsel had just, at that time, been appointed for him, and that he had no time to consult with counsel, or prepare his case, which objection was overruled and exception taken by said defendant, and the State of Washington being represented by C. C. Quackenbush, Esq., Deputy Prosecuting Attorney, and the court having ordered that the trial proceed, the following testimony was introduced, and proceedings had, to-wit:

A jury was empaneled and the prosecutor made an opening statement.

[fol. 5] PETER M. JACOY, a witness for the prosecution was sworn, and testified:

Direct examination.

By C. C. Quackenbush:

Mr. Carlson: At this time the defendant E. R. Lindsey objects to the introduction of any testimony on the ground that the information does not state a cause of action as to him.

The Court: Objection overruled. Exception noted.

A. My name is Peter M. Jacoy; my place of business is 402 Sprague Avenue, a cigar and confectionery store; I have lived in Spokane 30 odd years. I know the defendants Elbert B. Lindsey and E. R. Lindsey.

Q. Calling your attention to the date of April 15th, did you see either of the defendants?

A. Well, I don't know exactly whether it was on that particular 15th day. It must have been between the 15th or 16th of April but I would not say which one of those dates, I saw that gentleman over there (indicating Elbert B. Lindsey,) at 402 Sprague Avenue at my place of business.

Q. I hand you State's exhibit No. 1 for identification; State what that is?

A. It is a Forty Dollar check drawn on the Spokane and Eastern Trust Company.

Q. What was done in regard to State's exhibit No. 1, for identification on April 15th or the 16th?

A. Well, he came in and wanted the clerk to cash the check but the clerk turned this over to me, and I had a talk with Mr. Lindsey and asked him about the check and he told me that I could call Dr. Countryman over the phone; that he was sent over there by Dr. Countryman and the check was all right, but I didn't call Dr. Countryman, as I had seen him in there previously and knew him by sight, and [fol. 6] so I went ahead and cashed the check.

Q. And you accepted this instrument?

A. Yes.

Q. Then what did you do with this instrument?

A. I took the check and sent it to the bank, and a few days afterwards the check came back to us.

Q. Then who did you deliver the check to?

A. If I am not mistaken we delivered it to the insurance Co. the National Surety Co.

Q. Do you know the name of the representative of that Co.?

A. Yes, Mr. Pilkey.

Q. And what did Elbert Lindsey say to you with regard to the check; was there any conversation in regard to the check?

A. Well, it was made out and he signed on the back, he endorsed it before I gave him the money.

Q. Was there anything said about there not being and funds in the bank?

A. No.

Cross-examination.

By Mr. Donovan:

Q. This was on Saturday night?

A. It was in the afternoon but I don't recall the exact date.

Q. Would you say it was not on Saturday?

A. It was between the 15th and 16th.

Q. How do you fix the time of day?

A. It was between the 15th and 16th. It is there plain on the back of the check.

Q. The question is, from your own knowledge, can you tell when the check was presented to you?

[fol. 7] A. Yes.

Q. On this particular check can you say it was not presented to you on Saturday?

A. I would not say because I didn't look at the calendar.

Q. Would you say it was not on the 13th or 14th?

A. No.

Q. You don't know whether it was the 15th or 16th?

A. It was between the 15th and 16th. There is the stamp.

Q. But there is no date when the stamp was put on; is there any statement in your handwriting or any memorandum you made when the check came to you?

A. On the deposit slip, yes; the slip is dated and when the check comes back from the bank we refer back to this slip, and you can tell the date when the check went through the bank.

Q. Suppose the check came in on Saturday; if the check came in on Saturday you wouldn't make a deposit until the following Monday, isn't that correct?

A. Yes.

Q. Then your deposit slip would show the deposit on Monday?

A. Yes, it would show on Monday.

Q. So that so far as you know now you have no recollection, you don't know the date when this check was presented to you to be cashed?

A. We would know on the date but not the day of the month.

Q. What date was it cashed by you?

A. 15th or 16th of April.

Q. Could it have been presented to you at your place of business on Saturday the 13th?

A. No.

[fol. 8] Q. No, because the stamp on the back of the check will tell you what date it was presented.

Q. That shows when it went through the bank clearing house?

A. Yes.

Q. But that is not what I am getting at; do you know from your own knowledge or any record you have the date of the day when this check was handed to you and cashed by you except from the stamp on the back?

A. I could not say the day of the week but I could tell the day of the month.

Q. You said it was the 15th or 16th?

A. Yes.

Q. But that is all the reason there is, the stamp on the back from the bank?

A. No, not exactly. When the check came back we referred back to this record and that will show it was cashed on that date.

Q. Did you look up on your record to see when the check was cashed?

A. That could show the day of the month the check was presented.

Q. You say you haven't looked at your record since you were subpoened as a witness?

A. I didn't think it was necessary.

Mr. Quackenbush:

Q. You are positive it was either the 15th or 16th and not the 13th or 14th?

A. Absolutely.

By Mr. Donovan:

Q. Pardon me, there is one more question I want to ask Mr. Jacoy; the amount of this check was repaid to you was it not?

Mr. Quackenbush: I object as immaterial.
The Court: Objection sustained.
Exception.

[fol. 9] Mr. L. W. Pelkey, a witness for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is L. W. Pelkey; I live in Spokane; am the representative of the fraudulent bond department of the National Surety Corporation. Mr. Jacoy called me over to the store one morning and gave me this check, State's exhibit No. 1 for identification. I went to the police station to investigate the check and saw Mr. Aikman down there and gave the check to him.

Witness excused.

A. E. Aikman, a witness for the state was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is A. E. Aikman, I live in Spokane and am a police officer of the Spokane Police department, have been for 23 years. I first saw state's exhibit No. 1 for identification when Mr. Pelkey handed it to me on the 18th of April.

Witness excused.

M. S. Dugger, a witness called for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is M. S. Dugger and I live in Spokane and am a police officer and was such on April 15th of this year. I

have seen State's exhibit No. 1 for identification before. I put that pencil writing on the back myself, M. S. Dugger.

Witness excused.

CAPT. JAS. MCCARRY, a witness for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is James McCarry and I am a captain in the detective department of the Spokane police force, have been in the dept. about 25 years, and in this office 6 years. [fol. 10] I was in the same position on April 15, 1935. I have seen State's exhibit No. 1 for identification before in my office in the detective department on April 18, 1935. I put those two lines on the back, also my initials. Those would indicate the check was handed to me on that date and I put those on for identification.

Witness excused.

Mr. Quackenbush: At this time I offer State's exhibit No. 1 for identification in evidence.

Mr. Donovan: No objection.

The Court: It may be admitted.

(State's exhibit No. 1 admitted in evidence and marked.)

IGNATIUS MORRISON, a witness for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is Ignatius Morrison; I live at West 124 Nora; I know E. R. Lindsey and Elbert B. Lindsey.

Q. Calling your attention to the date of April 15, 1935, did you see them on that occasion?

A. I did.

Q. Will you state where you saw them?

Mr. Donovan: I object as incompetent, irrelevant and immaterial and having no bearing on the issues in this case.

The Court: Objection overruled.

Exception.

A. I saw the younger Mr. Lindsey in Hart & Dillatush's drugstore; the older Mr. Lindsey was at the corner of Stevens and Riverside about a half a block north from the drugstore.

Q. Did you have some conversation with the defendant Elbert B. Lindsey in Hart & Dillatush's drugstore?

A. I did.

Q. Will you state to the jury what it was?

Mr. Donovan: I object as incompetent, irrelevant and immaterial and not tending to prove any issue in this case, [fol. 11] and made out of the presence of the other defendant, E. R. Lindsey.

The Court: Objection overruled.

Exception.

A. When I entered Hart & Dillatush's drugstore I saw the younger Mr. Lindsey in there. I have known him for some time and we exchanged greetings, and he told me he was attempting to cash a check and was having a very difficult time. It was a $40 check I believe. I know he handed the check to the clerk and told him to call up Dr. Countryman who would vouch for the check, and the clerk went to the back of the store and in the meantime a party in there said that they did not have that much money, and the younger Mr. Lindsey asked where he could get the check cashed and I said Peter Jacoy's is a good place to cash checks and the younger Mr. Lindsey and I left the store and walked north on to Riverside Avenue.

Q. What took place then?

Mr. Donovan: I object to anything further as incompetent, irrelevant and immaterial, and move to strike all the testimony of this witness as being incompetent, irrelevant and immaterial and made out of the presence of the other defendant.

The Court: Objection overruled; motion denied.

Exception.

He asked me where I thought he could get it cashed and I told him I believed he could get it cashed at Peter Jacoy's, and so I went down the street to the corner and I turned West, and the younger Mr. Lindsey turned East, and just then the elder Mr. Lindsey was standing in the arch of Emery's clothing store and he came out from there and

whistled to the younger Mr. Lindsey who was crossing the street; he then turned and saw his father, and then walked across the street and then went east towards Washington street, and then I don't know what direction he went from there.

[fol. 12] It was on Monday the 15th of April, 1935.

Cross-examination.

By Mr. Donovan:

A. I fix the date because a day or two later I noticed in the paper where they had been arrested and I recollected back, it was two or three days prior to that I saw the younger Mr. Lindsey, I saw the check but not enough to see what the amount was.

Q. How long have you known Mr. Lindsey, Sr.?

A. I have known him to see him for some time. I don't know him personally. I have seen him up in the law library.

On April 15th I believe I was in the distributing business with my father.

Witness excused.

A. E. Aikman, a witness for the state, recalled.

Direct examination.

By Mr. Quackenbush:

A. I am the same A. E. Aikman who testified before. On the 18th day of April, 1935 I was present in Captain McCarry's office when Elbert B. Lindsey was being questioned about this check. I believe you (Quackenbush) did the questioning.

Q. Now I will ask you to state to the jury what was said by Elbert B. Lindsey in regard to this check that is in question here?

Mr. Donovan: If the court please, I object to the testimony of the witness as to any conversation, or alleged conversations at that time in the police station on the 18th of April, or other times, for the reason that any statements, if made, were made under duress, the defendant not being represented by counsel, and the alleged conversations, if any, were made by this defendant under stress, and under [fol. 13] threats and fear, and any statements made were

made solely by reason of threats of injury to the defendant, and the other defendant was not present.

The Court: Objection overruled.

Exception.

Q. I will ask you to state what the fact is as to any force or threats or duress or anything of that kind in regard to obtaining a statement from Elbert B. Lindsey

A. Absolutely none.

Q. Will you proceed and tell the jury what was said at the time this check was read to Mr. Lindsey?

The Court: That is referring to Exhibit No. 1.

Mr. Quackenbush: Yes.

Q. Was he shown the document?

A. He was shown the document, he was holding the check in his hand and you asked him if it was his father's signature, and he said he didn't know but he was sure his father signed it. He said he didn't see him sign it, but was satisfied that his father had signed it, and he went and cashed it at Peter Jacoy's, and got $40 of which he gave $5.00 to Dr. Countryman and $35 he gave to his father, and he stated that it was his father's money, and that was the reason he gave it to him.

Q. Was there anything said by Elbert as to there being funds in the Spokane & Eastern Trust bank?

A. You asked him and he said he didn't know for sure if there was any funds there, and you asked him if his father told him that he had funds there, and he said, well he may have but he did not recall.

Q. Now calling your attention to a conversation that was had between the defendant E. R. Lindsey and yourself in regard to this same matter, also in Capt. McCarry's office [fol. 14] were you present at that time?

Mr. Carlson: I object as incompetent, irrelevant and immaterial, and not in the presence of the other defendant.

The Court: Objection overruled.

Exception.

A. I was. Capt. McCarry and Alderson were also present; you (Quackenbush) conducted the questioning; there was no threats or force or duress used in any way. Well they asked Mr. Lindsey if he was an attorney practicing

law in the State of Washington and he said he was; you picked up this check and read it off to him and asked him if that was his signature on that check, Exhibit No. 1 and he said there was no question about it being his signature, and that he wrote the check for $40, and you asked him why, and he said there was some one in a jam. He said he didn't care to state who it was for the record. He said he didn't have any funds in the bank.

Cross-examination.

By Mr. Donovan:

A. At the time Elbert B. Lindsey, the son, was being examined by the police officers his father was not present, and he did not have any one there to represent him; he was in jail; I think it was along about noon, or after dinner, if I remember right. At the time Elbert B. Lindsey was arrested we did not have a warrant for him. He was arrested at the Davenport Hotel. His mother was not present when he was examined by the officers. At no time during the examination by police officers or Mr. Quackenbush was his father or mother present. We do not usually ask if a person wants any one present. I don't know how long he was in the Captain's office but as long as it took to make the statement, and then he was taken back to jail. That was on April 18th.

[fol. 15] Q. And you signed a complaint on April 19, against E. R. Lindsey, the father about this mater, in Judge Stocker's court?

A. I think so, yes. I didn't file a complaint against the son. Elbert never had any hearing in the police court as far as I know.

Cross-examination.

By Mr. Carlson:

A. It was the 18th of April that I was discussing with E. R. Lindsey about having funds in the bank.

Q. What was the date you had the son in custody down there?

A. We had them both in custody on the 17th, and the question of the check came up I believe on the 18th. The first time I had any discussion with Mr. E. R. Lindsey was on the 18th. He said he had no funds in the bank.

Q. Did you swear out the complaint on that date for E. R. Lindsey?

A. I don't believe that day I did.

Q. At that time didn't he tell you that he expected to have money in the bank at the time the check came in?

A. He did not make any statement as to that at all.

Witness excused.

CAPT. JAMES MCCARRY, a witness for the State, recalled.

Direct examination.

By Mr. Quackenbush:

I am the same James McCarry that testified before. I was present in my office on the 18th of April, 1935, when each of the defendants was questioned, separately. No threats or force or duress or violence or anything of that kind was used to force statements from either of the defendants.

[fol. 16] Q. Will you tell the jury the substance of the statements made by Elbert B. Lindsey?

A. You handed him the check and he said he cashed the check at Peter Jacoby's, and that his father had signed the check and after he got the cash he paid $5.00 to Dr. Countryman and gave his father $35.00. He said he knew his father didn't have any funds in the bank. He said it was his father's signature on the check.

Q. Now will you give the substance of any statements made by E. R. Lindsey in regard to State's exhibit No. 1?

A. He said that it was his signature on the check; he said that he had no funds in the bank; he said he needed this money for some purpose, but didn't say what the purpose was for the record but that he would probably tell you afterwards. E. R. Lindsey didn't sign any statement. Elbert B. Lindsey signed a statement in my presence.

Cross-examination.

By Mr. Donovan:

Q. Was Elbert B. Lindsey asked anything about his father's financial bank account?

A. No, he was not asked that.

Q. What was done with him after this inquiry?

A. He was taken back to the city jail.

Q. Was there anything else said by the young man relative to this check that you remember of?

A. No.

Witness excused.

[fol. 17] E. VAUGHN KLEIN, a witness for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

A. My name is E. Vaughn Klein and I am a vice-president of the Spokane & Eastern Trust Company. I was such during April, 1935. I have made an examination and could not find that E. R. Lindsey had an account there on the 15th of April. I could not find that he had an account there since 1927 or 1928. He had made no credit arrangements with me, and I inquired around amongst the other officers and could not find any one that he had made any such arrangement with.

Witness excused.

H. M. ALDERSON, a witness for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is H. M. Alderson; I am a police officer of the city of Spokane and have been for 24 years. I was in Captain McCarry's office on the 18th of April of this year when the defendants E. R. Lindsey and Elbert B. Lindsey were questioned, separately. A. E. Aikman, myself and Captain McCarry were present.

Q. Give briefly any statements made by Elbert B. Lindsey in regard to State's exhibit No. 1?

A. He said he had got the check for $40 from his father and had taken it down to Dr. Countryman's office and tried to cash it; that he paid Dr. Countryman $5.00; but that they didn't cash it for him there; that he later went to Jacoy's and cashed it for $40, and took $5.00 up and paid to Dr. Countryman, and $35 he gave to his father. He said he

[fol. 18] was not positive, but he was reasonably sure his father didn't have an account in the bank.

Q. I will ask you what was said by E. R. Lindsey?

A. Mr. Lindsey said that it was his signature and that he had signed the check, but first he said the boy must have taken it without his permission, and later he said he had given it to the boy and the boy cashed it. He said something about being in a jam, but he would not make any statement or any written statement in regard to it, but he did say that he would like to talk to you (Quackenbush) personally.

Cross-examination.

By Mr. Donovan:

Q. The boy was examined separately from his father?

A. Yes.

Q. Did you have more than one talk with the young man?

A. Yes, we had two or three talks with him, and I think that on one conversation his mother was present, but I couldn't say just when it was. I don't know as they have ever been out of jail since then.

Q. Was there any hearing in police court as far as you know?

A. Well, I was not present at any.

Cross-examination.

By Mr. Carlson:

Q. You know that E. R. Lindsey had been confined in the city jail two days before you showed him this check?

A. Well, I don't know; right around that time.

Witness excused.

Mr. Quackenbush: The State rests.

Jury retires.

[fol. 19] MOTIONS FOR JUDGMENT OF DISMISSAL.

Mr. Donovan: At this time, if the court please, the jury being absent and at the conclusion of the State's case, on behalf of Elbert B. Lindsey I request the court to take the case from the jury, and that judgment be entered dismissing that defendant, on the ground that there is no proof, not sufficient proof to go the jury against the son.

The Court: Motion denied.

Mr. Donovan: Exception.

Mr. Carlson: If Your Honor please, on behalf of the defendant E. R. Lindsey I request at this time that he be dismissed from this case by reason of the fact, that if anything is shown, it is only that he was an accessory in this case, and that the information charges that he obtained the money directly upon this check, and the evidence shows conclusively that at no time did he go to Peter M. Jacoy's and cash the check, and the information is not sufficiently specific against him as an accessory; it is a material variance.

The Court: Motion denied.

Mr. Carlson: Exception.

Jury recalled and opening statements made to the jury.

Mrs. Mayme Q. Lindsey, called as a witness by the defense, was sworn and testified:

Direct Examination.

By Mr. Donovan:

My name is Mayme Q. Lindsey; I am the wife of E. R. Lindsey and the mother of Elbert B. Lindsey.

Q. Do you know whether or not on or about April 12, 13, 14, and 15th of this year Mr. E. R. Lindsey had any money coming to him for legal services performed by him for a mining company?

A. I do.

[fol. 20] Q. Do you know what the amount of the fee was to be?

A. $125 to be paid right away.

Q. From whom was that fee to come?

A. Consolidated Silver Mining Co.

Q. Your husband had incorporated that company?

A. Yes, he was getting the incorporation papers out.

Q. Were you present when there was any conversation with reference of the payment of the fees to him?

A. Yes.

Q. State whether or not you knew that there was to have been a deposit made in the bank on April 15th to your husband's account on account of work done for this mining company?

A. Yes, there was to have been a deposit made in the Spokane and Eastern Trust Company.

Q. Were you present at any conversation in reference to that money being deposited where they said it would be paid on Monday?

A. I had talked to my husband.

Q. After Mr. Lindsey was arrested did any of the incorporators or any of the men interested in the company come to your house and make any payment of the money to you?

A. Yes.

Q. What time was that; how many days after his arrest?

A. I don't recall how many days.

Q. It was while he was in jail?

A. Yes.

Q. Now Mrs. Lindsey when were you first able to see your son in jail?

A. Well, I endeavored to see him—knowing that he had [fol. 21] been ill for a long time I felt that it was quite necessary to see him, as he had been ill for a long time.

Q. When was it that you saw him; how many days after he was put in?

A. I think two days.

Q. And who did you have to go to to get permission to see him?

A. I had to go to the office of the Commissioner of Public Safety, and I believe I went to Capt. McCarry.

Q. You had to go to the Commissioner of Public Safety before you could get to see him?

A. Yes.

Q. Were you ever present when he was examined by the officers?

A. No, I asked permission to be present but it was refused.

Q. State whether or not you were worried about his condition?

A. Yes, he was under the doctor's care for some time.

Cross examination.

By Mr. Quackenbush:

Q. You stated that the Commissioner of Public Safety gave you permission to see Elbert?

A. Yes.

Q. Did you have to see Capt. McCarry to get permission?

A. Not always, whoever was at the desk there; sometimes they refused me entrance, and when they refused me I went around to Capt. McCarry's and walked through his room —got permission from him.

[fol. 22] Q. Isn't it a fact that the officers made arrangements for you to see your son on the 18th? The evening of the 18th?

A. It is possible that I saw him then.

Q. Did I ever refuse you permission to see him?

A. I never asked you because I didn't think you were in charge.

Witness excused.

ELBERT B. LINDSEY, called as a witness by the defense, was sworn and testified:

Direct Examination:

By Mr. Donovan:

My name is Elbert B. Lindsey, I am 25 years old, I live with my parents, and have attended Gonzaga University.

Q. What was your condition of health the past year?

A. Not very good.

Q. Now with reference to this State's exhibit No. 1, the check in question; you have seen this before have you?

A. Yes.

Q. When?

A. It was on Saturday, April 13th of this year.

Q. Where did you see it?

A. On my father's desk where we have some papers, some corporation papers; it was all folded up amongst some corporation papers.

Q. Had you prior to that made a request on your father for money?

A. On the 11th or 12th I told him I had some bills to meet, that were pressing, and I would like to have some money to pay them. I took the check from his desk and went down town on April 13th and went to Dr. Country-[fol. 23] man's office, and from there to Hart & Dillatush's and then went to Peter Jacoys.

Q. When you went from there what did you do with the money?

A. I paid $5.00 to Dr. Countryman, and $10 to the Luncheonette on Sprague and $15 at the White Swan.

Q. Did you make any payment at the Oasis?

A. $10.00

Q. Did you give any of this $40 to your father?

A. No.

Q. Then when you were brought to the police station on the day you were arrested who did you first talk to?

A. The first day I was brought down by Aikman and Alderson and kept there I think it was in Captain McCarry's office. I was rather confused at the time, but I think it was McCarry's office.

Q. Did they interrogate you?

A. Not that day; I think I was down there about five times and then sent back to jail.

Q. Did they tell you what charge there was against you?

A. Not specifically.

Q. Did you make any request at that time for an attorney.

A. Yes, sir.

Q. And were you refused?

A. Yes, sir.

Q. When were you next taken down to the detective department?

A. The next day; that would be the 18th.

Q. Who did you talk to down there?

[fol. 24] A. Officer Aikman took me down there.

Q. Were you taken to Captain McCarry's office?

A. Yes.

Q. Who was present?

A. Capt. McCarry and officers Aikman and Alderson.

Q. Prior to the appearance of Mr. Quackenbush there did you talk to Capt McCarry with respect to this check?

A. They were present when I went into the office.

Q. State if at any time you asked Capt. McCarry or any of the officers to have somebody persent? An attorney?

A. I asked three or four times for an attorney to be present so I could be represented, but I was refused.

Q. What was said by you, if anything, to Capt. McCarry with reference to the date of the check?

A. I told Capt. McCarry it was a post-dated check.

Q. What did he say?

A. He told me he would throw me in jail if I didn't tell the truth.

Q. Now how many times did you tell him it was a post-dated check?

A. Three times.

Q. Was Mr. Quackenbush present at that time?

A. Yes.

Q. State whether or not you told them that several times?

A. I told them my story four or five times and they still didn't believe and they had their own theory and tried to force their theory on me.

Q. Were you arraigned in police court?

A. No.

[fol. 25] Q. When was the first arraignment you had in court?

A. What do you mean by having an arraignment?

Q. I mean when you appeared in any court?

A. I was taken before Judge Stocker on the 19th and he just took a look at me and said $2500 bond.

Q. No testimony was offered?

A. No.

Q. State whether or not the question was asked you at any time while you were in the city jail down there as to your father's bank account?

A. Yes, sir.

Q. What was your answer to the officers?

A. I told them I didn't know anything about his bank account at that time.

Q. At the time when you took the check did you believe that your father had money in the bank?

A. Yes, I did; but I didn't know anything about his affairs.

Cross-examination.

By Mr. Quackenbush:

Q. I want you to tell me whether you were treated unfairly by me at any time in this proceeding?

A. That would be a question whether you treated me unfairly or not. You asked me the questions but when you ask me if you treated me unfairly or not that would be a question.

Q. Isn't it true that I had charge of most of the questioning over there at the station?

A. Yes, but there was also officers Alderson, Aikman and Senseny.

[fol. 26] Q. This state's exhibit No. 1, that is the check we were quizzing you about?

A. Yes.

Q. Was it in my presence or out of my presence that you told Capt. McCarry that it was a post-dated check?

A. I don't recall; I think it was in your presence but I would not be positive of that.

Q. Was it in my presence or out of my presence that you say that you requested three or four times for an attorney?

A. It was in your presence.

Q. Now I show you state's exhibit No. 2 for identification and ask you to examine and state what that is?

A. That is my signature.

Q. Read it over?

A. I signed it for the reason that I was brought down there and it was shown me and I read it and I told you it was not what I said, but they said to me "there is five to one" against you and when you get into court if you don't sign it it will be used against you.

Q. Who said that?

A. Either McCarry or Aikman or Alderson.

Q. What else did they say?

A. And they said it didn't make any difference whether I signed it or not "we will gang up on you in court" and there is five of us to one of you.

Q. You did sign it?

A. Yes.

Q. That is your signature?

A. Yes.

[fol. 27] Q. This statement was taken on the 18th?

A. Yes.

Q. And signed on the 19th?

A. Yes, but you had it all the while.

Q. Is there anything in that statement to the effect that you told any of us that it was a post-dated check?

A. No, not in that part.

Q. Did you at any time request to have that statement inserted in the statement that you finally signed on the 19th?

A. I didn't even look at it when I signed it; I just glanced at the first page. It is not what I said, but somebody said, "there is five against one and it didn't make any difference

whether I signed it or not, as we will go into court and testify against you anyway."

Q. What did they do to compel you to sign the statement against your will?

A. There was no actual physical threats, at that time.

Q. What other kind of threats were there?

A. Do you want me to explain everything?

Q. Yes, go ahead and tell everything?

A. Well, I started in and told Capt. McCarry that it was a post dated check and he said "I will throw you back in the cell."

Q. I asked you to tell what threats were used to compel you to sign the statement?

A. Well, they threatened to come over and testify five to one against me if I didn't.

Q. Then why did you sign the statement, Elbert?

A. Well, I got tired of fighting them for two days and I decided that I would sign it.

[fol. 28] Q. Who did you fight with for two days?

A. McCarry and Alderson and Aikman.

Q. Was I there for two days?

A. You were there a part of the time.

Q. Was I there on the 19th?

A. No, not when it was signed.

Mr. Quackenbush: I offer state's exhibit No. 2 for identification in evidence.

Mr. Donovan: At this time I object as incompetent, irrelevant and immaterial and not tending to contradict or impeach the witness, and as having been obtained under duress.

The court: Objection over-ruled. It may be admitted.

Mr. Donovan: Exception.

(State's exhibit No. 2 admitted and marked.)

State's exhibit No. 3 marked for identification.

Q. Have you ever been convicted?

Mr. Donovan: I object. There is pending in the Supreme Court an appeal from the matter he is inquiring about, and while that question of appeal is pending it is improper at this time to attempt to use a conviction in the Superior Court when the case is pending on appeal and the conviction will not be complete until the Supreme Court has passed upon the questions involved.

The Court: Objection overruled.
Mr. Donovan: Exception.

Q. I hand you state's exhibit No. 3 for identification and ask you if you are the party referred to in that instrument?
A. Yes, I am.

[fol. 29] Mr. Quackenbush: I offer state's exhibit No. 3 in evidence.
Mr. Donovan: Same objection.
The Court: Objection overruled.
Mr. Donovan: Exception.

(State's exhibit No. 3, commitment of Elbert B. Lindsey received in evidence and marked.)

Mr. Quackenbush: Reads said exhibit in full to the jury.

Q. Now Elbert you say you got hold of this check on what day?
A. The 13th.
Q. Do you know what time of the day or week it was?
A. It was on Saturday.
Q. You heard the testimony of Mr. Jacoy and Mr. Morrison that it was on Monday the 15th?
A. Yes.
Q. You took this check and went down to Dr. Countryman's office?
A. Yes.
Q. About what time?
A. About 4:30 April 13, 1935.
Q. Did he tell you to go to Hart & Dillatush?
A. Yes.
Q. And what happened at Hart & Dillatush in regard to the check?
A. They said they didn't have sufficient funds to pay the $40.
Q. And from there where did you go?
A. From there I went—turned North on Stevens street, and went to the corner and started across there.
[fol. 30] Q. And there you met your father?
A. Yes.
Q. Did you know he was going to be there?
A. No.
Q. Did you at that time tell him you had the $40 check with you?
A. No.

Q. Did he at that time tell you that he had made out the $40 check for you?

A. I don't think he ever told me he had; he had told me he would make out a check.

Q. When you met your father on the street did you tell him at that time that you had the $40 check and that you were about to cash it?

A. No.

Q. You were then on your way up to Peter Jacoy's to get the check cashed?

A. Yes.

Q. When you met your father you said nothing about the check?

A. I spoke to him about another matter and about that time he went on into a building and I went on.

Q. Then you did go up to Peter Jacoy's with the check and cash it?

A. Yes.

Q. Now you say you had some bills that were pressing?

A. Yes.

Q. And what did you say about the $15 you paid to the White Swan?

A. Yes, I paid that.

[fol. 31] Q. And was that for a bad check?

Mr. Donovan: Wait a minute; I object to that.

Overruled. Exception.

Q. What was that money paid up to the White Swan for, for some payment on a bad check?

A. Yes, I owed them a certain amount of money and that was on account.

Q. That was on account of some check that you had given them for some $44 signed by you, a check against which you had no funds?

A. It was a post-dated check.

Q. You said you paid $5 to Dr. Countryman and $10 to the Oasis?

A. Not at the Oasis but at the cigar store there.

Q. What was that for?

A. For money that I owed there.

Q. Where is the Luncheonette?

A. On Sprague Avenue across from the Chronicle.

Q. What was that for there?

A. It was for money I owed there.

Q. On a check?

A. I am not sure.

Q. You cannot say what the nature of the deal was with the Luncheonette?

A. No.

At this time an adjournment was taken until 9:30 a. m. September 14, 1935, at which time the case was resumed, all parties being present.

[fol. 32] Elbert B. Lindsey still on the stand.

Cross-examination continued.

By Mr. Quackenbush:

Q. About what time was it you went to Jacoy's?

A. I could not say positively.

Q. When was it you paid $5.00 to Dr. Countryman?

A. On Monday.

Q. Did you get a receipt at that time?

A. I believe so; I am not sure.

Q. Isn't it true you went right back from Jacoy's to Dr. Countryman and paid him?

A. I am not certain whether I paid it that day, on Saturday, or on Monday—or whether I went back that night on another matter.

Q. Well, now, the 13th of April would be on what day of the week?

A. Saturday.

Q. And Monday would be the 15th?

A. Yes.

Q. What period of time would you say you were up there before you went to Hart & Dillatush?

A. About 10 minutes.

Q. So you want to say to this jury that it was on Saturday afternoon, April 13—approximately what time would you say you were at Dr. Countryman's?

A. About 5 or it might have been 5:15.

Q. You want to leave your story that way?

A. Yes.

Witness excused.

[fol. 33] E. R. LINDSEY, one of the defendants, called on behalf of the defense, was sworn, and testified:

Direct examination.

By Mr. Carlson:

Q. State your name, residence and occupation?

A. My name is E. R. Lindsay, I live at 1104½ W. 2nd Avenue, Spokane. I have lived in Washington since 1909; I am an attorney at law; have been practicing since 1918, and before that time I was a court reporter for many years. Just prior to April 13, 1935 I organized a corporation, did the legal work, called the Continental Consolidated Silver Mining Co. Its property was up near Twisp, but one of the men lived down in Whitman County, and about that time one or two of the men were down here and the rest were up at the mine; I don't know whether they had any permanent place of business here but one of them lived down in the country; I was their attorney; I was their attorney and they were to pay me $250 for organizing the company; $125 was to be paid immediately and the balance at $25 per month. A man named Widman at that time was Treasurer and handled the money; Widman lived down near Rosalia.

Q. Prior to April 13, 1935 did you have any conversation with Mr. Widman abont the payment of this fee?

A. Yes. I told him I was going out of town, that I had arranged to go to Sandpoint to perfect an appeal in a case I had up there. I expected to go out of town on Friday and if I perfected the appeal matter at Sandpoint I then expected to go over to the other side of the lake and look after some other matters over there. There was some discussion as to how he would get the money to me where I could reach it and arrange for it while I was away, and he told me he would—that he was banking at the Spokane [fol. 34] and Eastern Trust Company and could send it there and I asked if there was some way it could be placed to my credit, as I didn't know any other way I could get at it, and he said he would see to it that it was left there where I could get it, placed to my credit. He said he would be going through either Saturday or Sunday, and he would either bring it or send it so that it would be there for me either on Saturday or Sunday.

Q. Did it arrive there on Saturday or Sunday?

A. I found ont afterwards that it did not.

Q. What did you do after you found out the money had not yet arrived?

A. Some other matters came up and I did not go to Sandpoint, and so I called him up on long distance telephone. That was on Sunday and he said he would be up with it at 10:00 o'clock on Monday. That would be the 15th. He came in and told me he had the money but could not pay it out then; that they were having some trouble up at the mine to pay off some of the men; I think that two of them were there when he talked to me, and they were going to make trouble if they didn't get their pay, and he would have to go up to the mine to see how much money he would have to pay out, and he left that morning and went somewhere up there, I don't know where.

Q. Where is the mine located?

A. I have never been up there but they told me it was up near Twisp; Twisp is the nearest town as I understood.

Q. I will ask you to state whether it is not fact that on the 12th day of April you were supposed to have a case in Sandpoint, Idaho?

[fol. 35] A. I had a case there that I had tried and was perfecting the appeal on Friday of Saturday, I have forgotten which date. I had sent to the stenographer for the record, and the next day was the last day I had before I could perfect the appeal and get out the transcript, and then I could appeal to the Supreme Court.

Q. That was on the 12th?

A. I think the appeal was returnable on the 11th; either Friday or Saturday, one of those two days but I could not tell you without looking at the record.

Q. You may state whether or not it is a fact that you had some conversation with your son relative to some bills of his that he wanted you to advance him some money on?

A. He asked me, I think it was Friday, possibly it was Thursday, he asked me if I could let him have some money, that he needed some money, but he didn't say what he needed the money for. I believe it was on Thursday as near as I can recall.

Q. What did you tell him about it?

A. When I prepared my papers to go to Sandpoint I drew a check and put it with my papers but I didn't show it to him or tell him anything about it. My intention was if I went there to Sandpoint) when I am out of town I

always telephone down every night when I can reach a phone, and if I could get word from Mr. Widman that the money was there, I would then tell him to go ahead and cash the check.

Q. Is this State's exhibit No. 1 the check you made out and left there?

A. Yes, that is the check.

Q. Did you ever at any time tell anybody about it, or tell Elbert B. Lindsey, your son?

[fol. 36] A. No, I never told anybody I had made it out.

Q. How did the check get into his possession?

A. That I do not know.

Q. Where was the check left did you say?

A. On my desk in the apartment where I live.

Q. Did Elbert B. Lindsey have access to the Corporation papers?

A. Yes, he can look them over, as there was nothing to prevent him.

Q. Now when was the first notice that you had of the fact that the check had been issued to somebody? Or that somebody had it besides yourself?

A. I believe on April 18th, if my memory is correct; the day after I was arrested.

Q. And was this check presented to you by some police officers at that time?

A. Yes.

Q. State to the jury what they said to you when they presented the check? And you said to them?

A. I told them I was very much surprised.

Q. Something has been said during this trial about your meeting your son down there, do you have any recollection about that?

A. I don't recall any particular time I met him. I was out a good deal of the time and I frequently met him when I was down town, but I don't specifically remember meeting him this time.

Cross-examination.

By Mr. Quackenbush:

Q. You have stated that you told the police officers about your surprise that this check was out; was that some time [fol. 37] when I was present or some other time?

A. Well, Mr. Quackenbush, I could not say; they brought

me down and interrogated me so many times, I don't know whether you were present or not.

Q. How many occasions was there that I was present?

A. That I couldn't tell you either. I was down there eight or ten times—I could not say how many times; some days they had me down there three or four times.

Q. Do you recall one occasion when I was present on the 18th of April?

A. I think you were there on the 18th of April, yes.

Q. You made quite a 9 or 10 page statement to me at that time?

A. Well, there was parts of what I said taken down, but it didn't show much of what I said.

Q. There were at least 9 or 10 pages, wasn't there?

A. I think he took down quite a lot.

Q. That was taken in shorthand by Roy Meyers who works in the Commissioner's office?

A. I don't know who he is.

Q. A crippled fellow?

A. I think he is a lame fellow, yes.

Q. Did I inquire of you in regard to this check on the 18th of April?

A. Yes, there was some talk about it then.

Q. Just answer the question?

A. I could not tell—whether you inquired or not; there were 9 or 10 police officers in there and you were all talking at once.

[fol. 38] And yelling "don't lie to me" and don't do this and that. It was pretty warm sometimes. Were you there when Capt. McCarry called me a liar when I said I was a lawyer?

Mr. Quackenbush: I was not there then but I heard about it later.

A. Or was it the time they took some stuff out of another box and tried to call me a liar because I said I never had seen it, and then discovered their mistake?

Mr. Quackenbush: I don't remember about that.

Q. Now coming back to the question; did I inquire of you in regard to this State's exhibit No. 1?

A. I don't know; I couldn't say that you asked me about that.

Q. Will you answer the question, yes or no, whether I inquired about it or not?

A. I couldn't say, now.

Q. Would it refresh your recollection if I showed you this paper that was drawn up there (handing paper to witness.)

A. Yes, that is part of what was said there.

Q. I will ask you whether or not I inquired in regard to this check?

A. I can now say there were some questions.

Q. I will you answer my question, yes or no?

A. I am saying I cannot tell you who was talking as there were so many officers there.

Q. I had charge of the questioning that day, did I not?

A. No, I don't know whether you had charge of it or not, as there were 8 or 10 officers there.

Q. You say there were 8 or 10 officers?

A. Most of them were strangers to me. Aikman was [fol. 39] there some of the time—I think most of the time and Alderson was there some and Capt. McCarry was there sometimes.

Q. Were they all asking questions at the same time?

A. Sometimes they were.

Q. I will ask you whether I asked you this question, showing you the check, "April 15, 1935. Spokane Eastern Trust Co. Pay to the order of Elbert B. Lindsey $40. E. R. Lindsey," and asked you if that was your signature, and you said that it was your signature?

A. Yes, I answered that.

Q. Did I ask you this question: "The fact is you had no account in the Spokane and Eastern Trust Co." and you answered, "I have not."?

A. Yes.

Q. Now Mr. Lindsey at that time or at any other time did you tell me or any other police officer the story that you have told on the witness stand as to how the check was put in circulation?

A. I told them——

Q. Answer the question?

A. I say I didn't make any statement about the check.

Q. Just answer the question?

A. I am trying to give the conversation as near as I can remember it.

Q. Was Aikman and Alderson present at this time?

A. I don't know as I would want to say as there was quite a number of police officers there. I didn't know them all.

Q. Can you give a description of them so we can find out who they are?

[fol. 40] A. I could not—as I don't know them personally.

Q. I asked if Capt. McCarry and A. E. Aikman and H. M. Alderson were at all of the meetings you had with the police officers if myself or one of those three were there at every meeting?

A. They were at some meetings.

Q. Can you answer yes or no?

A. No I could not say for sure.

Q. Who seemed to be acting as if they had charge of the meeting?

A. No one seemed to be taking a greater part than any of the others.

Q. Will you say whether two or three of the men I have mentioned were present at the time you made this statement about putting this check in circulation?

A. I would not say.

Q. You knew that those were the men that had charge of the case?

A. I didn't know that.

Q. What other officers questioned you besides Capt. McCarry and Aikman and Alderson?

A. I don't know who all they were.

Q. Did you ever tell me the story you have told here as to how you made this check out?

A. No I never had a chance.

Q. How many times have you seen me since the 18th of April?

A. Well, the 3rd of May I first saw you over here.

Q. Now Mr. Lindsey have you ever been convicted of crime?

Mr. Carlson: I make the same objection as before.

Overruled. Exception.

[fol. 41] A. I have.

Q. I hand you a paper marked State's exhibit No. 5 for indentification and ask you if you are the party referred to in that instrument?

A. I assume I am; that is my name.

Mr. Carlson: I object as incompetent, irrelevant and immaterial.

Overruled. Expection.

Mr. Quackenbush: I offer State's exhibit No. 5 in evidence.

Mr. Donovan: We object as incompetent, irrelevant and immaterial.

The Court: Objection overruled. Exception.

(State's exhibit No. 5 admitted in evidence, being a commitment of E. R. Lindsey.)

Mr. Quackenbush read the exhibit to the jury.

Q. Now what day or date was it your son Elbert asked you for money?

A. My best recollection is that Thursday would be the day.

Q. That would be the 11th?

A. It might have been Wednesday.

Q. Elbert had been living at home all the time with you?

A. Yes, he lives there.

Q. Both of you under the same shelter?

A. Both live in the same apartment house.

Q. How soon thereafter was it that you wrote this check that is in evidence here?

A. My memory is I got my papers ready on Thursday, as I intended to go to Sandpoint on Friday morning.

Q. That is your signature to this exhibit?

A. I have so testified.

[fol. 42] Q. At the time you wrote the check did you have any account in the Spokane and Eastern Trust Company at Spokane, Wash.?

A. Not on that date.

Q. Did you have any account there on the 12th of April?

A. No.

Q. Did you have any account there on the 13th of April?

A. No.

Q. Did you have any account there on the 14th of April?

A. I did not, as it turned out.

Q. Did you have any account there on the 15th of April?

A. It turned out I did not.

Q. Well did you?

A. No.

Q. Did you have during April 1935 any arrangement with any officer of the Spokane and Eastern Trust Company for any line of credit against which you could issue checks?

Mr. Donovan: I object as immaterial and incompetent.

Objection overruled. Exception.

A. No.

Witness excused.

Mr. Donovan: Defendant Elbert B. Lindsey rests.
Mr. Carlson: Defendant E. R. Lindsey rests.

[fol. 43] Prosecution in Rebuttal.

CAPT. JAMES MCCARRY, recalled by the State, already sworn.

Direct examination.

By Mr. Quackenbush:

Q. There has been testimony here, Captain, and statements were made that police officers other than yourself and officers Aikman and Alderson went into this matter; now you may state whether or not there were any other officers in it besides yourself and Aikman and Alderson?

A. No, I don't believe there was.

Q. There has been testimony of E. R. Lindsey that he told the police officers that he issued this check on April 11th or possibly the 12th I think; that on Thursday the 11th this check was placed in his office files; what would you say as to whether that statement was made by E. R. Lindsey?

A. No.

Q. Now as to the son Elbert B. Lindsey, he testified that he told the police that this check, exhibit 1, was a post-dated check?

A. No, he never told me that.

Q. Were you present when the statement was made by Elbert B. Lindsey, also when it was signed?

A. I was.

Q. I will ask you if there was any compulsion of any kind used on him in getting him to sign the statement?

A. No, there was not.

Witness excused.

[fol. 44] A. E. AIKMAN, a witness for the prosecution, recalled, already sworn.

Direct examination.

By Mr. Quackenbush:

Q. I will ask you if you were present on the occasion when the elder Mr. Lindsey was questioned?

A. I was.

Q. I will ask you if on any of those occasions he told the story that he wrote this check on April 11th and placed it in his papers?

A. No, he never made that statement.

Witness excused.

DR. C. W. COUNTRYMAN, a witness called by the State in rebuttal, was sworn and testified:

Direct examination.

By Mr. Quackenbush:

A. My name is Dr. C. W. Countryman with offices in the Paulsen Medical-Dental building. I know E. R. Lindsey and Elbert B. Lindsey.

Q. Do you recall a visit to your office by Elbert B. Lindsey?

A. I do.

Q. In the spring of this year?

A. Yes.

Q. Will you tell the jury what day that was?

A. It was on Monday, April the 15th.

Q. And what was the call in connection with?

Mr. Donovan: I object as immaterial and irrelevant.

Objection overruled. Exception.

A. He brought in a check for $40 made out to himself and said that it had been signed and that it was his father's check, and wanted to make a payment of $5.00 on account.

[fol. 45] Cross-examination.

By Mr. Donovan:

Q. How do you fix the date as to when Elbert was there with the check?

A. Because he came back within an hour and paid $5.00 to my secretary on account.

Q. Did you give him credit on his account?

A. Yes.

Q. Payment was made to you?

A. No, to my secretary.

Q. Did you make any notation as to when that payment was made?

A. No, only so far as I remember it was late in the afternoon.

Q. It might have been on Saturday?

A. It would have been impossible because I am out of my office Saturday afternoons.

Q. You were not there on Saturday afternoon the 13th?

A. No.

Q. Will you say doctor that during the time you have been practicing you never have been in your office Saturday afternoons?

A. I have never been in my office on Saturday afternoon after 1:00 o'clock or 1:15 at any time.

Witness excused.

Mr. Quackenbush: The State rests.

Mr. Donovan: Nothing further.

Mr. Carlson: We rest.

Jury excused.

[fol. 46] MOTIONS TO DISMISS, ETC.

Mr. Carlson: Comes now the defendant E. R. Lindsey, at the close of all the evidence and renews his motion to dismiss as to him, or in the alternative that the court direct the jury to return a verdict of not guilty on the following grounds:

(1) That there is a fatal variance between the charge in the information and the proof adduced at the trial.

(2) That the evidence fails to show any act on the part of the defendant towards the commission of the crime charged.

(3) That the evidence fails to show any intent to defraud and there is not even any evidence on which an inference of intent could be based.

(4) That neither the law nor the evidence would justify the jury in returning a verdict of guilty against this defendant.

(5) That any verdict so returned would be contrary to the evidence and not supported by any evidence.

(6) That all the evidence in the case would not warrant a verdict of guilty against this defendant.

Mr. Donovan: Without repeating it, I make the same motion on all the same grounds as to the defendant Elbert B. Lindsey.

The Court: Each of the motions is denied.
Mr. Carlson: Exception.
Mr. Donovan: Exception.

[fol. 47] In Superior Court of Spokane County

Certificate of Judge

State of Washington,
County of Spokane, ss:

I, Chas. H. Leavy, Judge of the Superior Court for Spokane County, Washington, and the Judge who tried the above entitled cause, to-wit: State of Washington, plaintiff, vs. Elbert B. Lindsey and E. R. Lindsey, No. 11046 of the said Superior Court, do hereby certify that the above and foregoing statement of facts contains all the material facts, matters and things heretofore occurring in said cause, and not already a part of the record therein, and that the facts and matters stated therein were facts and matters occurring at the trial of said cause; and that said statement of facts contains all the material evidence, both oral and in writing, except the exhibits; that Plaintiff's exhibits Nos. 1, 2, 3 and 5 were introduced at the trial of said cause, and that either the originals or certified copies of all said exhibits accompany this statement of facts and are hereby made a part hereof; that said statement of facts was duly and regularly served and filed within the time authorized by law, and that no amendments were proposed or made to said statement except such as appear therein; that due and regular written notice was given the plaintiff of the time and place of settlement and certifying said statement of facts, as is required by law and rules of court.

Done at Spokane, Wash, this 31 day of Dec. 1925.

Chas. H. Leavy, *Judge.*

[fol. 48] CASE No. 11046. ADMITTED PLAINTIFF'S EXHIBIT No. 1 FOR IDENTIFICATION

Member Federal Reserve System
Spokane, Wash., Apl. 15, 1935. No. 21.

28-4—Spokane and Eastern Trust Company—28-4

Pay to the order of Elbert B. Lindsey, $40.00.
Forty 00/..... Dollars
E. R. Lindsey.

Endorsed on Back

Elbert B. Lindsey
1104½ W. 2nd Ave.,
Co-Service National Guard.

M.S.D. Prop # 15822.

Pay The Washington Trust Co.,
Spokane, Wash. Or Order
Peter M. Jacoy

In Evidence
4-19-35. D.

J. McC.

[Stamp:] Washington Trust Co. Paid Apr. 17, 1935, Through Clearing House, Spokane, Wash. 28-8 Cancelled.

[fol. 49] CASE No. 11046. PLAINTIFF'S EXHIBIT No. 2 FOR IDENTIFICATION. ADMITTED

Elbert B. Lindsey

4:20 p. m., April 18, 1935.

Capt. McCarry, C. C. Quackenbush, A. E. Aikman, H. M. Alderson, James McCluskey

STATE OF WASHINGTON,
County of Spokane, ss:

Quackenbush: What is your name?

A. Elbert B. Lindsey.
Q. What is your address?
A. 1104½ West Second Avenue.
Q. You are the son of E. R. Lindsey, is that correct?
A. Yes.

Q. Now this check, dated April 15, 1935, No. 21, Spokane & Eastern Trust Co., • • • pay to the order of Elbert B. Lindsey $40.00, signed • • • E. R. Lindsey; that check was signed by your father—is that true?

A. I didn't see it signed, but I know it was.

Q. And of the $40.00 received from Peter M. Jacoy, $5.00 you paid to Dr. C. W. Countryman and $35.00 was paid to your father, E. R. Lindsey?

A. Yes.

Q. You knew at the time that he had no account at the Spokane & Eastern Trust Company?

A. I was fairly certain that he didn't.

Q. He told you in fact that he didn't have any account there, and you knew it, isn't that true?

A. Yes—he might have told me but I cannot recall.

Q. On this $40.00 check of April 15, 1935, you had an understanding with your dad that you were to return him this $35.00?

[fol. 50] A. Yes, that was my understanding, exactly and it was his money not mine.

I make this statement voluntarily, without duress, knowing that the same may be used against me.

(Signed) Elbert B. Lindsey.

Subscribed and sworn to before me this 19th day of April, 1935. Geo. M. Johnson, Notary Public. (Seal.)

[fol. 51] Case No. 11046. Plaintiff's Exhibit No. 3 for Identification. Admitted

In the Superior Court of the State of Washington for Spokane County

Case No. 11045.

The State of Washington, Plaintiff,

vs.

Elbert B. Lindsey, Defendant

Judgment, Sentence and Commitment Upon Verdict of Guilty

Reformatory

On this 10th day of July, 1935, the above named defendant came into open Court for pronouncement of judg-

ment and sentence, and being asked by the Court if he had any legal cause to show why judgment of this Court should not be pronounced in his case, he makes his statement, the defendant being represented by E. R. Lindsey and L. J. Birdseye his counsel.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Attempted Grand Larceny, as to Count I, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed, that said defendant Elbert B. Lindsey be punished by confinement in the Washington State Reformatory, for a term of not more than 7½ years, (Seven and one half years) and shall pay the costs of this prosecution taxed at $51.95.

[The said sentence to run Concurrently, Consecutively.]*

That said defendant shall stand committed to said institution until this sentence is complied with

It is the further order of the Court that——.

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 10th day of July, 1935.

E. V. Kuykendall, Judge.

Filed Jul. 10, 1935, Frank C. Nash, Clerk.

Certificate

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington, for Spokane County, do hereby certify the foregoing to be a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open Court while the defendant was personally present.

[* Matter enclosed in brackets, struck out in copy.]

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 13 day of September, 1935.

Frank C. Nash, Clerk. W. C. Steinmetz, Deputy.
(Seal.)

Reformatory Verdict of Guilty.

[fol. 52] CASE NO. 11046. PLAINTIFF'S EXHIBIT NO. 5 FOR IDENTIFICATION. ADMITTED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

Case No. 11045.

THE STATE OF WASHINGTON, Plaintiff,

vs.

E. R. LINDSEY, Defendant

Judgment, Sentence and Commitment Upon Verdict of Guilty

Penitentiary

On this 10th day of July, 1935, the above named defendant came into open Court for pronouncement of judgment and sentence, and being asked by the Court if he had any legal cause to show why judgment of this Court should not be pronounced in his case, he makes his statement, the defendant being represented by E. R. Lindsey and L. J. Birdseye his counsel.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Attempted Grand Larceny, as to Count I, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed, that said defendant E. R. Lindsey be punished by confinement in the Washington State Penitentiary, for a term of not more than 7½ years, (Seven and one half years) and shall pay the cost of this prosecution taxed at $51.95.

[The said sentence to run Concurrently, Consecutively.]*

That said defendant shall stand committed to said institution until this sentence is complied with.

[* Matter enclosed in brackets, struck out in copy.]

It is the further order of the Court that——.

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 10th day of July, 1935.

E. V. Kuykendall, Judge.

Filed Jul. 10, 1935, Frank C. Nash, Clerk.

Certificate

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington, for Spokane County, do hereby certify the foregoing to be a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open Court while the defendant was personally present.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 13 day of September, 1935.

Frank C. Nash, Clerk. W. C. Steinmetz, Deputy.
(Seal.)

Penitentiary Verdict of Guilty.

[fol. 53] [File endorsement omitted]

IN SUPERIOR COURT OF SPOKANE COUNTY

No. 11046
[Title omitted]

INSTRUCTIONS TO JURY—Filed September 14, 1935

Ladies and Gentlemen of the jury:

Statement of the Case

This is a criminal case wherein the State of Washington is the plaintiff, and Elbert B. Lindsey and E. R. Lindsey,

are the defendants. The defendants are charged by an information filed herein by the Prosecuting Attorney, with the crime of Grand Larceny committed as follows:

"That the said defendants, Elbert B. Lindsey and E. R. Lindsey, in the County of Spokane, State of Washington, on or about the 15th day of April, 1935, then and there being, did then and there wilfully, unlawfully, feloniously and fraudulently, by color and aid of a check in words and figures as follows: to-wit:

Spokane, Wash., Apl. 15, 1935. No. 2.

Spokane and Eastern Trust Company

Pay to the order of Elbert B. Lindsey $40.00

Forty 00/ ..... Dollars

E. R. Lindsey."

and endorsed on the back thereof: "Elbert B. Lindsey, 1104½ W. 2nd Ave. Co. Service National Guard"

obtain from Peter M. Jacoy Forty Dollars ($40.00) in money and currency of the United States of America of the value of Forty Dollars, and the property of the said Peter M. Jacoy, with intent to deprive and defraud the said Peter M. Jacoy, the owner thereof, the said defendants then and there knowing that the maker and drawer of said check was not authorized or entitled to make or draw the same."

[fol. 54] Instruction No. 1

To this information the defendants Elbert B. Lindsey and E. R. Lindsey, have entered a plea of not guilty, which puts in issue each and every material allegation of the information.

I instruct you that the defendants are presumed to be innocent of the crime with which they are charged, and that presumption attaches to and continues with them throughout all stages of the trial, and throughout all stages of your deliberations, and until it has been met and overcome by the evidence in the case, beyond a reasonable doubt.

This presumption is a part of the law of the land to which the defendants are entitled, and unless this presumption is overcome by the evidence in the case beyond a reasonable doubt, you must acquit the defendants.

The fact that an information is filed against the defendants, constitutes no evidence of their guilt. That is merely the formal instrumentality provided by the law as a means of bringing a defendant to trial and subserves such purpose alone. His guilt must be proved independently of that. In arriving at a verdict, therefore, you will give no consideration to the fact that the defendants have been informed against as tending in any way to establish their guilt.

Instruction No. 2

The jury are instructed that the burden is on the State of proving every fact material and necessary to a conviction by competent evidence, beyond a reasonable doubt. It is not sufficient that the State should prove these facts by a mere preponderance of the testimony, nor, on the other hand is it necessary that it should prove them conclusively [fol. 55] in such manner as to leave no room for any doubt whatever. Very few things in the whole domain of human knowledge are susceptible of absolute proof. We can have a moral certainty, which may vary in degree, but rarely an absolute certainty.

The expression "reasonable doubt" means in law just what the words imply—a doubt founded upon some good reason. It must not arise from a merciful disposition or a kindly, sympathetic feeling, or a desire to avoid performing a disagreeable duty. It must arise from the evidence or lack of evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial doubt, such as an honest, sensible and fairminded man might with reason entertain consistently with a conscientious desire to ascertain the truth.

You must use your common sense as men and women of experience possessing some knowledge of worldly affairs, and if, after examining carefully all the facts and circumstances in this case, you can say and feel that you have a settled and abiding conviction of the guilt of the defendants, then you are satisfied of their guilt beyond a reasonable doubt. If you have not such a conviction, then you should acquit them.

Instruction No. 3

You will note that in this case there are two defendants charged jointly, and you are instructed that the burden

rests upon the State of establishing by the evidence, beyond a reasonable doubt, to your satisfaction, the guilt of each defendant, as an independent fact. Therefore, if you should find from the evidence, beyond a reasonable doubt, that the State has established the guilt of one of the defendants, it would not necessarily follow that the other [fol. 56] defendant was guilty, but the burden rests upon the state to establish that fact as to each defendant.

Instruction No. 4

You are instructed that the laws of the State of Washington, (Remington's Compiled Statutes 2601—2, provide as follows:)

"Any person who shall with intent to defraud make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet said check, in full upon its presentation, shall be guilty of larceny. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank for the payment of such check or draft, and the uttering or delivery of such a check or draft to another person, without such fund or credit to meet the same shall be prima facie evidence of an intent to defraud."

You are further instructed that the laws of the State of Washington, Section 2601, sub-division 2 provide as follows:

"Every person who, with intent to deprive or defraud the owner thereof—shall obtain from the owner • • • the possession of • • • personal property by color and aid of any order for the payment or delivery of property or money or any check, knowing the maker or drawer of such check was not authorized or entitled to make or draw the same, steals such property and shall be guilty of larceny."

Instruction No. 5

You are instructed that before you can convict the defendant E. R. Lindsey, you must find from the evidence beyond a reasonable doubt:

(1) That on or about the 15th day of April, 1935, in Spokane County, Washington, he made the check described in the information herein and delivered it to his son, Elbert B. Lindsey, co-defendant herein.

(2) That the making and delivery of said check, if any, by said E. R. Lindsey was with an intent to defraud some person, or persons.

(3) That at the time of the making and delivery, if any, [fol. 57] said E. R. Lindsey knew that he did not have either funds or credit with the Spokane and Eastern Trust Company, the bank upon which it was drawn, to meet said check upon its presentation.

If you find each of the foregoing elements in this case to have been established by the evidence beyond a reasonable doubt, then you would find the defendant E. R. Lindsey guilty as charged in the information. If, on the other hand, the State has failed to prove each of the foregoing elements to your satisfaction, beyond a reasonable doubt, then it would be your duty to acquit the defendant E. R. Lindsey.

You are instructed that as to the defendant, Elbert B. Lindsey, before you can find him guilty of the charge contained in the information herein, you must find from the evidence beyond a reasonable doubt:

(1) That on or about the 15th day of April, 1935, in Spokane County, Washington, said Elbert B. Lindsey, by color and aid of the check here in question, obtained from Peter M. Jacoy, the sum of Forty Dollars in currency of the United States.

(2) That at the time said Elbert B. Lindsey presented said check to Peter M. Jacoy, and obtained the money thereon, he knew that the drawer and maker thereof had not sufficient funds, or had not made credit arrangements with the Spokane and Eastern Trust Company, the bank upon which the check was drawn.

(3) That said defendant Elbert B. Lindsey, in procuring payment on said check from Peter M. Jacoy, did so with the intent to deprive and defraud said Peter M. Jacoy of his property, towit: Forty Dollars, currency of the United States.

If the State has established each of the foregoing elements by evidence in this case to your satisfaction, and beyond a reasonable doubt, then you should convict said [fol. 58] defendant Elbert B. Lindsey. On the other hand, if the State has failed to establish each of the foregoing elements beyond a reasonable doubt, then it would be your duty to acquit said defendant, Elbert B. Lindsey.

Instruction No. 6

You will note from the instructions heretofore given you herein that the specific charge upon which the defendant E. R. Lindsey is being tried, is that of issuing the check in question, with an intent to defraud, knowing at the time of the issuance of said check that he had neither sufficient funds, nor credit with the bank upon which it was drawn.

As to the defendant Elbert B. Lindsey, the specific charge contained in the information against him is that with an intent to deprive and defraud the owner thereof, he obtained from Peter M. Jacoy the sum of Forty Dollars by color and aid of the check in question herein, knowing at the time he so obtained the money that E. R. Lindsey, the maker of said check, neither had funds in the bank upon which it was drawn, nor had credit arrangements with said bank, sufficient to meet it when it would be presented.

If the state has established these charges as to each of the defendants herein by the evidence in this case beyond a reasonable doubt, then you should convict the said defendants. If, however, you are satisfied from the evidence beyond a reasonable doubt as to one defendant and not satisfied as to the other, then you should acquit the one and convict the other; and if the State has failed to establish by the evidence beyond a reasonable doubt the foregoing facts, as to either defendant, then you should acquit both *both* defendants.

[fol. 59] Instruction No. 7

The jury are instructed that pretenses made by either defendant, even though made falsely are not sufficient to constitute the offense charged; that in order to find the defendants, or either of them guilty, there must be a false pretense, knowingly made, coupled with a criminal intent, at the time of making the false pretense, if you find beyond a re-sonable doubt that any false pretenses were made.

You are further instructed that the intent of one defendant, cannot be imputed to the other, but that each defendant must be judged according to his own intent.

Instruction No. 8

You are instructed that the intent with which an act is done is a mental process, and as such generally remains hidden in the mind where it was conceived, and is hardly, if ever, susceptible of proof as direct evidence, but must be inferred or gathered from the outward manifestations, and by the words and acts of the party entertaining it, and the facts and circumstances surrounding and attending upon the act which said party is charged to have been connected.

You are further instructed that the intent of one defendant, when two defendants are being tried together, cannot be imputed to the other, but that each defendant must be judged according to his own intent.

Instruction No. 9

If you find from the evidence in this case beyond a reasonable doubt that the defendants did commit the crime as [fol. 60] charged in the information, then any payment or offer of payment of the amount of such check by the defendants or any other person afterwar*fs* cannot be considered as any defense in this case.

Instruction No. 10

The jury are instructed that as to any evidence admitted during the trial of this case showing, or tending to show prior conviction of the defendants, or either of them, such evidence, if any, may be considered by you solely and only in so far as it may or may not affect the credibility of such defendant and the weight and value to be attached to his testimony, and for no other purpose whatsoever. The fact, if you find it to be a fact from the evidence in this case, that the defendants, or either of them, were previously convicted of any crime, or crimes, is not evidence of the commission by such defendant of the crime with which he stands charged in this case and is now being tried, and must not be considered as such by you.

Instruction No. 11

The jury are the sole judges of the facts in the case and also of the credibility of the witnesses, and of the weight

and value to be given to their testimony. In determining as to the credit you shall give to a witness, and the weight and value you should attach to his or her testimony, you may take into consideration the conduct and appearance of the witness on the stand; the interest of the witness, if any, in the result of the trial; the motive actuating the witness in testifying; the witness' relation to or feeling for or against the plaintiff or defendant, as the case may be; the probability or improbability of the witness' statements; the opportunity the witness had to observe or be informed [fol. 61] as to the matters respecting which such witness gives testimony; and the inclination of the witness to speak truthfully or otherwise as to the matters within the knowledge of such witness. All these matters being taken into account with all the other facts and circumstances given in evidence, it is your province to give to the testimony of each witness such value and weight as you deem proper, if upon the consideration of all the evidence you conclude that any witness has willfully sworn falsely as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony, except in so far as it may be corroborated by other credible testimony in the case.

Instruction No. 12

These instructions are given by the court as a whole, and are so to be considered by you. Each and every instruction is to be considered by you in connection with all the other instructions.

Your verdict must be based upon the evidence, in arriving at it you should not discuss or consider anything in connection with this case, except the evidence received upon the trial. You are the exclusive judges of the evidence, but it is your duty to accept the law from the court as given to you in these instructions.

If I have said anything during the course of the trial, or if in ruling on motions or objections, I have made any statement, which appears to you to be a comment or opinion on the facts, or on the weight or convincing effect of the testimony of any witness, or as to the guilt or innocence of the defendant, it is your duty to disregard it. Likewise the statements of the attorneys in the case, made during the trial and in their arguments, are not evidence and should

be disregarded by you unless they accord with what your own recollection of the evidence is.

[fol. 62] Instruction No. 13

This being a criminal case it will require your entire number of 12 jurors to return a verdict.

In retiring to deliberate upon your verdict you will select one of your number as foreman, whose duty it will be to sign and date the verdict when you have agreed upon one, and to speak for the jury when called upon by the court to do so.

You will take with you to the jury room the exhibits in this case, which have been admitted in evidence, and these instructions.

There will be submitted for your convenience two forms of verdict; One, a verdict of guilty as charged in the information, with blank spaces left thereon for you to fill in the name, or names, of the defendant or defendants who you find guilty, if any; the other will be a verdict of not guilty with blank spaces left thereon on which you will fill in the name or names of such defendant or defendants that you find not guilty.

You will now listen to the argument of counsel.

(Sgd.) Chas. H. Leavy, Judge.

[fol. 63] [File endorsement omitted.]

In Superior Court of Spokane County

No. 11046

[Title omitted]

Verdict—Filed September 14, 1935

We, the jury in the above entitled action find the defendant E. R. Lindsey and Elbert B. Lindsey guilty, as charged in the information. Recommendation for leniency.

Dated at Spokane, Washington, this 14th day of September, 1935.

Geo. Earl Jordan, Foreman.

[fol. 64] IN SUPERIOR COURT OF SPOKANE COUNTY

No. 11046

STATE OF WASHINGTON, Plaintiff,

vs.

E. R. LINDSEY, Defendant

JUDGMENT, SENTENCE AND COMMITMENT UPON VERDICT OF GUILTY.—Filed November 1, 1935.

On this 1st day of November 1935, the above named defendant came into open court for pronouncement of judgment and sentence, and being asked by the Court if he had any legal cause to show why judgment of the Court should not be pronounced in his case, he makes his statement, the defendant being represented by Ralph E. Carlson, his counsel.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Grand Larceny, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed that said defendant, E. R. Lindsey, be punished by confinement in the Washington State Reformatory for a term of not more than 15 years, and shall pay the costs of this prosecution taxed at $26.50.

That said defendant shall stand committed to said institution until this sentence is complied with.

It is the further order of the Court that——.

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 1st day of November, 1935.

Chas. H. Leavy, Judge.

Certificate

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington for Spokane County, do hereby certify the foregoing

to be a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open Court while the defendant was personally present.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 1st day of November, 1935.

Frank C. Nash, Clerk, by Nels Paulsen, Deputy.
(Seal.)

[File endorsement omitted.]

Penitentiary Verdict of Guilty.

Filed in Clerks Office Supreme Court, State of Washington, Jan. 2, 1936, Benj. T. Hart, Clerk, by Archie B. Stewart, Deputy.

[fol. 64½] In Superior Court of Spokane County

No. 11046

State of Washington, Plaintiff,

vs.

Elbert B. Lindsey, Defendant

Judgment, Sentence and Commitment Upon Verdict of Guilty.—Filed November 1, 1935.

On this 1st day of November 1935, the above named defendant came into open court for pronouncement of judgment and sentence, and being asked by the Court if he had any legal cause to show why judgment of the Court should not be pronounced in his case, he makes his statement, the defendant being represented by—— —— in person.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Grand Larceny, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed, that said defendant Elbert B. Lindsey be punished by confinement in the Washington State Reformatory for a term of not more than 15 years, and shall pay the costs of this prosecution taxed at $26.45.

That said defendant shall stand committed to said institution until this sentence is complied with.

It is the further order of the Court that——.

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 1st day of November, 1935.

Chas. H. Leavy, Judge.

Certificate

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington for Spokane County, do hereby certify the foregoing to be a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open court while the defendant was personally present.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 1st day of November, 1935.

Frank C. Nash, Clerk, by Nels Paulsen, Deputy.
(Seal.)

[File endorsement omitted.]

Reformatory Verdict of Guilty.

Filed in Clerks Office Supreme Court State of Washington, Jan. 2, 1936, Benj. T. Hart, Clerk, by Archie B. Stewart, Deputy.

[fol. 65] [File endorsement omitted.]

IN SUPREME COURT OF WASHINGTON

EXTRACTS FROM CERTAIN ASSIGNMENTS OF ERRORS THAT APPELLANTS MADE TO THE SUPREME COURT OF WASHINGTON ON APPEAL,—Filed January 2, 1936.

The Notations (Tr—) found in these extracts do not refer to pages of this record, and should be disregarded.

Page 18—Assignment of Error No. 2

The court erred in not sustaining the motion of E. R. Lindsey made at the close of all the evidence (St Vol 1 43) as follows:

"Comes now the defendant E. R. Lindsey, at the close of all the evidence and renews his motion to dismiss as to him, or in the alternative that the court direct the jury to return a verdict of not guilty on the following grounds:

(1) That there is a fatal variance between the charge in the information and the proof adduced at the trial.

(2) That the evidence fails to show any act on the part of this defendant towards the commission of the crime charged.

(3) That the evidence fails to show any intent to defraud, and there is not even any evidence on which an inference of intent could be based.

(4) That neither the law nor the evidence would justify the jury in returning a verdict of guilty against this defendant.

(5) That any verdict so returned would be contrary to the evidence and not supported by any evidence.

(6) That all the evidence in this case would not warrant a verdict of guilty against this defendant."

Page 22.

As I have already shown this defendant, E. R. Lindsey, as well as Elbert B. Lindsey, was charged, jointly, with Grand Larceny in obtaining $40 from Peter M. Jacoy by color and aid of check No. 2, etc.

And E. R. Lindsey was tried for an altogether different alleged offense, to-wit: under R. R. S. Sec. 2601-2, by the following subterfuge:

At the close of the evidence the Prosecuting Attorney submitted to the court a requested instruction, under [fol. 66] R. R. S. Sec. 2601-2 (Tr 26-27), which instruction the court submitted to the jury (Tr 35) in words and figures as follows:

"Any person who shall with intent to defraud, make, or draw, or utter, or deliver to another person any check, or

draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet said check, in full upon its presentation, shall be guilty of larceny. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank for the payment of

Page 22 such check or draft, and the uttering or delivery of such a check or draft to another person, without such fund or credit to meet the same shall be prima facie evidence of an intent to defraud."

Instruction No. 5

"You are instructed that before you can convict the defendant E. R. Lindsey, you must find from the evidence beyond a reasonable doubt:

(1) That on or about the 15th day of April, 1935, in Spokane County, Washington, he made the check described in the information herein and delivered it to his son, Elbert B. Lindsey, co-defendant herein.

(2) That the making and delivery of said check, if any, by said E. R. Lindsey was with an intent to defraud some person or persons.

(3) That at the time of making and delivery, if any, said E. R. Lindsey knew that he did not have either funds or credit with the Spokane and Eastern Trust Company, the bank upon which it was drawn, to meet said check upon its presentation.

If you find each of the foregoing elements in this case to have been established by the evidence beyond a reasonable doubt, then you would find the defendant E. R. Lindsey guilty as charged in the information. If, on the other hand, the state has failed to prove each of the foregoing elements to your satisfaction, beyond a reasonable doubt, then it would be your duty to acquit the defendant E. R. Lindsey."

Instruction No. 6 (Tr. 37)

"You will note from the instructions heretofore given you herein that the specific charge upon which the defendant E. R. Lindsey is being tried, is that of issuing the check in question, with an intent to defraud, knowing at the time

of the issuance of said check that he had neither sufficient funds, nor credit with the bank upon which it was drawn."

These instructions were a plain departure from the allegations of the information. The information being under R. R. S. 2601 and the instructions as to E. R. Lindsey being under R. R. S. 2601-2.

Page 24

The court charged the jury as to Elbert B. Lindsey as follows:

[fol. 67] Instruction No. 5 (Tr. 36)

"You are instructed that as to the defendant, Elbert B. Lindsey before you can find him guilty of the charge contained in the information herein, you must find from the evidence beyond a reasonable doubt:

(1) That on or about the 15th day of April, 1935, in Spokane County, Washington, said Elbert B. Lindsey, by color and aid of the check here in question—etc."

Page 25

(2) That at the time said Elbert B. Lindsey presented *said* check, etc."

(3) That said defendant, Elbert B. Lindsey, in procuring payment on said *check*, etc. (Italics mine.)

Instruction No. 6 (Tr. 37)

"As to the defendant Elbert B. Lindsey, the specific charge contained in the information against him is that with an intent to deprive and defraud the owner thereof, he obtained from Peter M. Jacoy the sum of Forty Dollars by color and aid of *the check in question herein*, etc.

Knowing at the time he so obtained the money that E. R. Lindsey the maker of *said* check, neither had funds in the bank upon which it was drawn, nor had credit arrangements with said bank to meet *it* when it would be presented."

E. R. Lindsey was further charged in the instructions, under an entirely different statute, and a different state of facts, one which is a separate and distinct crime, and to which a penalty of "petit larceny" only was attached and not "grand larceny."

Thus trying two defendants, in one trial, under one in-

formation, for two distinct, unrelated crimes, under different statutes, with different penalties, each offense requiring distinct evidence, and neither defendant taking part in the other's offense, and each offense requiring different instructions to the jury, on a distinct state of facts. This cannot be done under our laws and constitution, and neither E. R. Lindsey, nor Elbert B. Lindsey can lawfully be convicted under such a condition. There was no jurisdiction as to either.

Page 26

As to the charge under 2601-2 there was no information [fol. 68] and no jurisdiction.

Page 27

There was no information charging E. R. Lindsay with committing a crime under R. R. S. 2601-2.

Assignment of Error No. 3. Page 28 of Brief

The court erred in not granting the motion of Elbert B. Lindsey, for dismissal at the close of all the evidence. (St. Vol. 1-43.) This motion was the same as that made by E. R. Lindsey, set out in the preceding assignment of error, and was denied and exception taken. (St. Vol. 1-43.)

The same argument applies to this assignment as does to the assignment relating to E. R. Lindsey, excepting that Elbert B. Lindsey was not charged in the instructions under 2601-2.

Assignment of Error No. 6. Page 37 of Brief

The court erred in submitting the case to the jury under instructions, against two defendants, not on a joint charge, but on a charge under R. R. S. 2601 against Elbert B. Lindsey, and on a charge under R. R. S. 2601-2 against E. R. Lindsey.

The court in its instructions to the jury (Tr. 34) charged:

"You will note that in this case there are two defendants charged jointly," etc.

Then the court follows that instruction by instruction No. 4 (Tr. 35):

"You are instructed that the laws of the State of Washington, (Remington's Compiled Statutes 2601-2 provide as follows:

"Any person who shall with intent to defraud make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet said check, in full, upon its presentation, shall be guilty of larceny. The word "credit" [fol. 69] as used herein shall be construed to mean an arrangement or understanding with the bank for the payment of such check or draft, and the uttering or delivery of such a check or draft to another person, without such fund or credit to meet the same shall be prima facie evidence of an intent to defraud."

"You are further instructed that the laws of the State of Washington, Section 2601, sub-division 2 provide as follows:

"Every person who, with intent to deprive or defraud the owner thereof—shall obtain from the owner • • • the possession of • • • personal property by color and aid of any order for the payment or delivery of property or money or any check, knowing the maker or drawer of such check was not authorized or entitled to make or draw the same, steals such property and shall be guilty of larceny."

Then the court follows with instruction No. 6 (Tr. 37):

"You will note from the instructions heretofore given you herein that the specific charge upon which the defendant E. R. Lindsey is being tried, is that of issuing the check in question, with an intent to defraud, knowing at the time of the issuance of said check that he had neither sufficient funds, nor credit with the bank upon which it was drawn.

"As to the defendant Elbert B. Lindsey, the specific charge contained in the information against him is that with an intent to defraud and deprive the owner thereof, he obtained from Peter M. Jacoy the sum of Forty dollars by color and aid of the check in question herein, knowing at the time he so obtained the money that E. R.
Page 38. Lindsey, the maker of said check, neither had funds in the bank upon which it was drawn, nor had credit arrangements with said bank, sufficient to meet it when it was presented."

It will be noted that he says "the specific charge upon

which E. R. Lindsey is being tried"—. He does not say E. R. Lindsey was ever charged with such an offense.

And as to Elbert B. Lindsey, he says "the specific charge contained in the information • • •".

Then the court goes on in instruction No. 6 (Tr. 37) and says:

"If the State has established these charges as to each of the defendants herein by the evidence in the case beyond a reasonable doubt, then you should convict the said defendants."

In other words, the court charged the jury that if they found E. R. Lindsey guilty under R. R. S. Sec. 2601-2, and found Elbert B. Lindsey guilty under R. R. S. Sec. 2601, [fol. 70] then the jury should convict them jointly of some crime—he does not charge which one, whether under 2601 or 2601-2.

Then the court goes on in instruction No. 8 (Tr. 38) and says:

"You are further instructed that the intent of one defendant when two defendants are being tried together, • • •"

And in instruction No. 9 (Tr. 38):

"If you find from the evidence in this case beyond a reasonable doubt that the defendants did commit the crime as charged in the information, • • •"

This trial and the procedure had thereunder and the instructions quoted above violate the IV, V, VI and XIV Amendments to the Constitution of the United States.

Page 39

The motions in arrest of judgment (Tr. 43-45) of both defendants, in right, must be sustained; in any event the case should in some form be ordered dismissed.

[fol. 71] Assignment of Error No. 13. Brief Page 46

The court erred in not granting Elbert B. Lindsey a separate trial.

A motion was made therefor (Tr. 17) and denied (Tr. 23).

That charge was changed in the substitute information (Tr. 4) and in the 2nd substitute information (Tr. 14),

both of which charged Elbert B. Lindsey and E. R. Lindsey, jointly, directly as principals, and with the same acts, viz: with obtaining the money on the check from Peter M. Jacoy.

This condition existed down through all the proceedings thereafter, until the time to instruct the jury was at hand. At the time of preparing instructions the prosecuting attorney representing the state presented requested instructions (Tr. 26-27), one instructing under R. R. S. 2601, and another under R. R. S. 2601-2—being two entirely different offenses, not related to each other, in which the defendants were not charged jointly, and the one under R. R. S. 2601-2 not being charged in the information.

Page 47

And the court adopting such requested instructions, charged the jury (Tr. 35-36) to find E. R. Lindsey guilty, if at all, under one law and its related facts, and to find Elbert B. Lindsey guilty under a different law and its related facts.

The charge as to E. R. Lindsey under 2601-2 R. R. S. being given in the face of the positive law of this state, Pierce Code 9148:

"No person shall be held to answer in any court, for an alleged crime or offense, unless upon an information filed by the prosecuting attorney, or upon an indictment by a grand jury, except in cases of a misdemeanor before a Justice of the Peace or before a court martial." and

Pierce Code Sec. 9272: "The indictment or information must contain but one crime, and in one form only, except that where the crime may be committed by use of different [fol. 72] means, the indictment or information may allege the means in the alternative."

Where a charge, such as the case at bar—contains a charge of two separate crimes, against two separate persons, and not on a joint state of facts, it violates all the principles of "due process" both under the constitution of the United States and of this state, and all positive law.

Page 48

Then the court, in order to add to his theory of "conviction at any price or means", charged the jury (Tr. 41):

"There will be prepared for your convenience two forms

of verdict: One a verdict of guilty as charged in the information, with blank spaces left for you to fill in the name or names, of the defendant or defendants who you find guilty, if any; the other will be • • • a verdict of not guilty with blank spaces left, etc."

It will be noted that the court did not furnish the jury with verdicts in accordance with his instructions, i. e.

A verdict of guilty as to E. R. Lindsey of the crime laid down in Sec. 2601-2, and

A verdict of guilty as to Elbert B. Lindsey of the crime laid down in Sec. 2601, or as charged.

No, the court came out straight from the shoulder and says to the jury:

"If you find the defendants guilty of anything—taking into account all the evidence as to both crimes in relation to which I have charged you—just write their names in this blank I have furnished you, which will make them guilty of grand larceny."

This was in plain violation of the rights of the defendants under the constitution of the United States and of this State, as to "due process of law."

It is apparent that the whole intention of the prosecutor was from the beginning to try two defendants on two sepa- [fol. 73] rate charges, in the same information, and to spring this situation on them at the time of giving the instructions. It cannot be done under any law. This proceeding must fall.

[fol. 74] Assignment of Error No. 15. Page 51 of Brief

The court erred in admitting in evidence over objection State's exhibits Nos. 3 and 5, being a commitment of each of the defendants on another charge. (St. 25 and 38.)

Page 53

Here we have commitments and sentences under a new statute, and I do not think there can be any question but what the commitments and sentences are ex post facto as to these defendants and thus utterly void, under the United States Constitution, but they do not even show the sentence.

Under the present law all the trial court can do is to write in the commitment the maximum sentence provided by law

for the alleged crime, and then within six months
pp. 54 after the convicted person is received at the place of confinement, the board of prison, terms and paroles, as it is called, fixes the sentence.

And as stated supra it would seem to be beyond question that these sentences and commitments that were introduced are void, and whether there can be another judgment and sentence pronounced, if the verdict is upheld—which does not seem possible under the record and facts, that another sentence would have to be pronounced, and thus the court in this case is, we contend, in the position of allowing something, of the most prejudicial kind, to be used as evidence, which does not, as a matter of fact exist.

[fol. 75] Assignment of Error No. 19. Brief page 64

The court erred in not granting the motion of E. R. Lindsey in arrest of judgment. (Motion tr. 45.) (Denied, journal entry Tr. 59.)

No conviction could legally be had of E. R. Lindsey, under R. R. S. 2601-2, as set out (Statute) in the court's instructions, (Tr. 35) (quoting Sec. 2601-2) and as set out in instruction No. 6.

As to this charge, being a different charge under R. R. S. 2601-2, there was never any information filed against E. R. Lindsey, charging such an offense; no such information was sworn to; he never had a chance to plead to such an information; was never informed of the nature of any such charge against him, and such charge never existed.

Page 65

To submit to a trial jury such instructions as hereinbefore set out and direct them to find a verdict of guilty if they find those elements established by the facts, when there has been no information filed, and none of the legal formalities complied with, violates the provisions of the Constitution of the United States in the following particulars:"

Violates Article XIV (14th amendment) wherein it is stated:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

So that it seems too plain for argument that E. R. Lindsey could not be tried in this case under R. R. S. Sec. 2601-2, as set out in the charge, and under the purported necessary elements of that offense as also set out in the charge.

The motion in arrest of judgment must be sustained as to any such charge in this case.

[fol. 76] Now as to the charge under R. R. S. 2601, the charge alleged in the information. (Tr. 14.)

The motion in arrest of judgment must be sustained as to that charge for the following reasons:

(1) The prosecuting attorney by submitting his requested instructions (Tr. 26-27) and which the court adopted as set out supra, thereby abandoned any attempt to convict E. R. Lindsey under R. R. S. Sec. 2601. The court specifically charged that unless the jury found the necessary elements to exist under Sec. 2601-2, that they should acquit E. R. Lindsey: (Tr. 36.)

"If on the other hand, the state has failed to prove each of the foregoing elements (those set out supra) to your satisfaction, beyond a reasonable doubt, then it would be your duty to acquit the defendant E. R. Lindsey."

There was no evidence on which to convict the defendant under Sec. 2601; Peter M. Jacoy testified (St. Vol. 1-2) that E. R. Lindsey had nothing to do with cashing the check and obtaining the money from him; there was not a suspicion of evidence in the case to show any intent to defraud by E. R. Lindsey, nor from which an intent to defraud could be deduced, and this is a necessary element under Sec. 2601. This was recognized by the court, and also by the prosecuting attorney by the method they pursued, and that charge was abandoned as to E. R. Lindsey, and he was in effect acquitted of that charge.

[fol. 77] Assignment of Error No. 20. Brief Page 68

The court erred in not sustaining the motion in arrest of judgment of Elbert B. Lindsey (Motion Tr. 43) (denied tr. 59).

Furthermore, under the information (Tr. 14) taken in connection with the instructions of the court, all the sections of the Constitution of the United States set out in the pre-

vious assignment of error in regard to E. R. Lindsey, were violated • • •.

[fol. 78] Assignment of Error No. 27. Brief Page 76

The law under which defendants were tried, convicted and sentenced was, and is, as to them void, being an ex post facto law being in direct violation of Section 10 of Article 1, of the Constitution of the United States: "No state shall • • • pass any • • • ex post facto law.

Page 77

The offense in this case is alleged to have been committed on or about April 15, 1935. (Tr. 14.)

The law under which the trial and sentence was had went into effect at midnight June 12, 1935 (See Statute) Chap. 114, Laws of 1935 of Washington.

Now in what particulars, if any, did this law Chap. 114, change the situation of defendants to their disadvantage?

The charge (Tr. 14) is grand larceny.

The punishment on April 15, 1935, was:

Under R. R. S. 2605 "imprisonment in the State Penitentiary for not more than fifteen years."

Also R. R. S. Sec. 2281 provided at that time:

"Where no minimum term of imprisonment is prescribed by law the court shall fix the same in its discretion at not less than six months nor more than five years."

Thus there was a sliding scale for both the minimum and maximum sentences, viz:

Minimum: From six months to five years.

Maximum: From six months to fifteen years.

Chap. 114, Laws of 1935 of Washington, changed this sentence as follows:

[fol. 79] Repeals R. R. S. 2281, and deprives the court of the power to fix and minimum, or any discretion in fixing the maximum.

Makes the maximum a flat 15 years as follows:

Page 78

In this case the maximum provided by law is 15 years. Chap. 114, Laws of 1935, thus deprives the defendants of any right to have the maximum fixed at less than 15 years,

which the court in its discretion had a right to do before, i. e., on April 15, 1935.

In other words, under Chap. 114, the sentence is always the maximum provided by law, and the convicted person is always subject to it under the discretion of the board, while under the law as it existed on April 15, 1935, the maximum term might, in the discretion of the court be fixed at a shorter term.

Page 80

A person convicted of an offense committed before Chap. 114 went into effect, but who was not convicted and sentenced until afterwards, cannot be subjected to any such imprisonment—it is void as to them—but the Act, Chap. 114, applies to all who may enter the institution after the Act went into effect.

There are no exceptions. The act is void as to these defendants and there is now no law under which they may be sentenced.

[fol. 80] IN SUPREME COURT OF WASHINGTON

NOTICE OF DECISION OF AFFIRMANCE—Filed August 20, 1936

Mr. Ralph E. Foley, Mr. C. C. Quackenbush, Mr. E. R. Lindsey, Spokane, Washington.

DEAR SIRS:

#26004—Re State of Washington vs. Lindsey and Lindsey

Opinion in the above entitled case filed this date.

"We find no prejudicial error in the trial of the case and the judgment is affirmed."

Yours very truly, Benj. T. Hart, Clerk, by Archie B. Stewart, Deputy.

[File endorsement omitted.]

[fol. 81] Copy Rec'd Oct. 3, 1936, Prosecuting Attorney, Spokane County, Wash.

[File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

MOTION IN ARREST OF JUDGMENT ON THE GROUND THAT THE DEFENDANTS WERE DENIED THE RIGHT TO TESTIFY IN THEIR OWN BEHALF AND TO CALL WITNESSES, IN CONTRAVENTION OF THE CONST. OF THE U. S., AND THAT A CONVICTION UNDER THE CIRCUMSTANCES IS A SHAME AND A REPROACH TO THE LAW—Filed October 7, 1936

I

The affirmance by this court on Aug. 20, 1936, Vol. 87, Wash. Dec. 298, and thereby directing that the defendants, and each of them be deprived of their liberty by the State of Washington, for a term of 15 years, is a direct denial of the rights of the defendants, as guaranteed to them by the VI and XIV amendments to the Constitution of the United States, and as guaranteed by Art. 1, Sec. 22 of the Constitution of the State of Washington.

And further such decision, in the words of this Supreme Court of Washington, as announced in State v. Harrass, 22 Wash. at p. 57, "It would be a shame and a reproach to the law to hold the defendants accountable for the laws mistakes."

In that, the defendants, and each of them were in all substantial effect, and in contemplation of the laws and Constitutions mentioned:

1. Each defendant denied the right to testify in his own behalf.

2. Each defendant denied the right to call witnesses in his own behalf.

3. Each defendant was denied a fair and impartial trial.

[fol. 82] II

That the defendants and each of them are denied the rights guaranteed to them by the XIV Amendment to the

Constitution of the United States, by this Supreme Court failing, neglecting and refusing to pass upon the question fairly presented to them in this case as to the rights of the defendants under the laws and constitutions, when as in this case, although as the court announced in its decision that the impeachment and annulment of the testimony of the defendants, and their witnesses by the introduction of the records of a previous conviction of a felony was without error by the trial court, of the effect on the rights of the defendants, when, before final decision in this court, and while the jurisdiction is solely in this court, this court renders a decision that the same previous convictions used for impeachment and annulment of testimony, were illegal, and obtained by misconduct of the Prosecuting Attorney (the same one who tried this case) and by the refusal of the trial Court, Hon. E. V. Kuykendall, to correct the situation, when duly called to his attention, and this court reversed and set aside said previous convictions.

III

That the specific question involved is:

That on May 3, 1935, the Deputy Prosecuting Attorney of Spokane County, Washington, filed two criminal informations against the defendants, jointly; that one of the cases was brought to trial on June 12, 1935, the said Deputy Prosecutor, one C. C. Quackenbush, representing the State of Washington; the cases being prosecuted in the name of the [fol. 83] State of Washington. Hon. E. V. Kuykendall, Judge of the Superior Court of the State of Washington, presiding as trial judge; that in order to obtain a conviction the said Quackenbush (among other things) put before the trial jury in his argument false and libelous statements of and concerning the defendants, and each of them, and in regard to matters not in evidence; that the defendants strenuously opposed this by proper objections, but that the trial Judge, E. V. Kuykendall, failed, neglected and refused to take any action to protect the rights of these defendants, as was held by this court in State v. Lindsey, 185 Wash. 206, where the statements of the prosecutor and the conduct of the trial judge are fully set out.

That the defendants at once appealed to this court, and took all proper steps so to do, and complained to this court of the said actions of the State officers in condemning them,

and each of them wrongfully to imprisonment, and this court on Jan. 10, 1936, sustained and upheld the contention of defendants, and in said case of State v. Lindsey, 185 Wash. 206 held said convictions to have been illegally obtained, by the said acts of said State officers, and this court annulled and set aside said convictions, and they have ever since been and remained so annulled and set aside, as being illegal under the law.

That the illegality of said convictions was not occasioned by any act or omission on the part of the defendants, or either of them, but was solely a wrongful act of the State of Washington.

That the said C. C. Quackenbush, Deputy Prosecutor, for [fol. 84] and on behalf of the State of Washington, brought the case at bar—one of the cases started on May 3, 1935—on for trial on Sept. 12, 1935, and before defendants could have the illegality of the said convictions tested in this court, although defendants used their utmost diligence in the matter; that in the trial of said cause it was necessary and proper that the defendants testify, on their own behalf and as witness for each other; that they did so offer themselves as witnesses; that at the time of so doing the said C. C. Quackenbush impeached and annulled the effect of their testimony, and of each of them, by presenting in evidence and reading to the jury the convictions, judgments and sentences so obtained in the previous case, and which was then on appeal. That this was allowed by the trial court, and held to be proper in the decision of this court, State v. Lindsey, Vol. 87, Wash. Dec. 298.

And then the question in issue is presented; What is now the effect on the rights of the defendants, their conviction having been obtained by the use of impeaching testimony, and in effect depriving them of their right to testify and to call witnesses, when the impeaching testimony is now shown to have been illegal, and the illegality was occasioned by the acts of the State and not by the acts of the defendants?

This question this court has ignored in its decision, supra, and failed, neglected and refused to pass on; yet condemning the defendants to a long deprivation of their liberty, solely through the illegal acts of the State's Officers, sometimes called a mistake of law.

This question has been fairly presented to this court. This court is the only court that had has jurisdiction of

[fol. 85] this case since January 1, 1936, and the only one that has had or could have jurisdiction of the case since the former convictions were declared illegal.

Defendants have presented to this court, by way of a Supplemental Transcript, a certified copy of the decision and remittitur in the former case, annulling and holding illegal the said former convictions.

Defendants have also presented a motion to this court to be allowed to place in evidence, before this court, a certified copy of said decision.

This court also has before it its own opinion holding the said convictions to be illegal, as found in State v. Lindsey, 185 Wash. 206.

And one Department of this court—five of the same members who now sit en banc, were the members of this court that considered said case at the time the convictions were held to be illegal.

This question was raised in our briefs at all times after the convictions were set aside, and especially in the brief filed at the time of the hearing en banc, on June 29, 1936, wherein on page 14 we said:

"And it seems to us that one of the grave questions in this case is the question of the effect of the evidence and exhibits introduced by the State over objection, as to the previous convictions of the defendants (for whatever purpose introduced) and the fact that the case in which those convictions were obtained has now, since the trial of this case in the lower court, and those verdicts, judgments and sentences, has been annulled, cancelled and set aside, so that in reality they never existed either in fact or in law."

And on page 19, same brief:

"The situation is the same as though they had been [fol. 86] forged by the prosecutor; they were procured by his own wrong doing in the previous case, and when that fact is shown, as it has been, there can be no question but that the defendants were denied a fair and impartial trial thereby.

Under no theory of law or practice or procedure, sanctioned by this court, or by any other court of the land, can this conviction be maintained, with these exhibits before the jury.

While it is true that the statutes of this state and the

decisions of this court permit former convictions (when they actually exist) of a witness to be shown to affect his credibility, and so also when the defendant takes the stand he is a witness, still the prejudice as to the defendant is far greater if his own conviction is shown than if it is applied to some other witness, for in the case of a witness, it cannot be taken into account as a part of the evidence prejudicing the jury against the defendant. But it would seem useless to continue the argument along these lines, *for these former convictions never really existed.*"

This same matter was also presented to this court in our reply brief, pp. 1, 2 and 3; in a supplemental brief pp. 6, 7, and 8, and in the brief on hearing en banc pp. 14 to 19.

It was fully presented, and absolutely ignored by this court, the only court having jurisdiction in the matter, to apply the corrective for the wrong that has been occasioned by the mistakes of the law.

This court having affirmed the judgment, and this situation still existing, it is the plain duty of this court to grant the motion and arrest the judgment as to each of the defendants.

This motion is based on the files and records in this case and on the affidavit of E. R. Lindsey, hereto attached.

E. R. Lindsey, for Appellants, 1104 1-2 W. 2nd Avenue, Spokane, Wash.

[fol. 87] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

AFFIDAVIT OF E. R. LINDSEY IN SUPPORT OF MOTION IN ARREST OF JUDGMENT—Filed October 7, 1936

STATE OF WASHINGTON,
County of Spokane, ss:

E. R. Lindsey being first duly sworn on oath deposes and says: that he is one of the appellants above named, and makes this affidavit in support of the motion of defendants in arrest of judgment. That defendants are now, by the decision of this Supreme Court of August 20, 1936, affirming a judgment of the Superior Court of Spokane County, Wash., dated Nov. 1, 1935, condemned to be deprived of

their liberty, and ordered confined in the penal institutions of the State of Washington, by the said state, its officers and agents, acting under the authority of the said state, and in its name, for a term of 15 years each, by means and virtue of—

What is legally termed "a mistake of the law", now being enforced, perpetrated and carried out, knowingly, by one C. C. Quackenbush, Deputy Prosecuting Attorney of Spokane County, Washington, and upheld by the Supreme Court of the State of Washington, sitting en banc, by a judgment written by Hon. O. R. Holcomb, one of its judges, with the notation "All concur", which is taken to mean that the other eight judges, comprising the whole of said court agree to said opinion, with the full knowledge of all the [fol. 88] said judges that the defendants are so condemned to be deprived of their liberty by "a mistake of the law", for which defendants or either of them were in no way responsible, and that said judgment will be carried out and defendants so deprived of their liberty, if said judgment is left in force and effect.

That said "mistake of law" was not occasioned by any act or omission on the part of the defendants, or either of them, but was solely caused and occasioned by the acts of the State of Washington, its officers and agents.

That said "mistake of law" is one which has not been provided for or a remedy provided by any act of the law-making power of the State of Washington.

That defendants are now and at all times have been entitled to the presumption of innocence, until they have been accorded a fair trial, and their guilt demonstrated by the State by legal evidence, upon a fair trial, where no constitutional or legal right is denied them.

That if the laws of the State of Washington do not provide a plain, adequate procedure by which a defendant may be convicted, without the State taking advantage of a "mistake of law" of a denial of defendants' constitutional rights, then the presumption of innocence prevails and defendants are entitled to their liberty.

That further, the "mistake of law" was caused, occasioned and brought about by acts of the State and its officers, that demonstrate that it has been done as a deliberate fraud, first occasioned by fraudulent, wrongful and illegal acts of the said C. C. Quackenbush, Deputy Prosecuting

[fol. 89] Attorney, acquiesced in by Hon. E. V. Kuykendall, a Judge of the Superior Court in the first instance, in that the said C. C. Quackenbush, falsely and libelously stated to the trial jury of and concerning E. R. Lindsey,

"But so far as E. R. Lindsey is concerned he is so hardened in crime that there is no hope that he will ever reform"

and stating of and concerning Elbert B. Lindsey at the same time and place:

"If we want to send Elbert B. Lindsey to the penitentiary as his counsel has suggested, we have a much greater crime that we could have charged him with than this; one that he might have been charged with and much more easily convicted; this is just a small matter."

And then when the defendants made the proper application to the Judge, E. V. Kuykendall, to properly instruct the jury in regard to the above libelous matter, the said judge failed, neglected and refused to do so.

That such actions of said Quackenbush and the trial judge were wrongful and unlawful, and on account thereof this court reversed said convictions. Lindsey v. State, 185 Wash. 206.

That the information in the above case was filed by the said prosecutor on May 3, 1935, who at the same time filed the information in the case at bar; that the apparent motive of the said prosecutor in using such means to secure a conviction was for the purpose of using such conviction to impeach the defendants and their witnesses in the case at bar, just as he did subsequently so use the conviction, and to so use it before defendants could have it set aside.

That the said "mistake of law" is now being further carried out and by means thereof unlawfully depriving these appellants of their liberty, by this Supreme Court [fol. 90] acquiescing in said acts of the said prosecutor, by the decision of this court affirming the judgment at bar, with full knowledge that said convictions and sentences have heretofore been annulled and set aside.

That treating the situation as a simple "mistake of law" it occurred and was brought about as follows:

That on Sept. 12, 1935, defendants, jointly, were tried in the Superior Court of Spokane County, Washington, on the felony charge in the case at bar, being prosecuted by said C. C. Quackenbush (Tr of files 14). That defendant

Elbert B. Lindsey was called as a witness for the defense, both for himself and his co-defendant (St F 19). That E. R. Lindsey defendant was likewise called as a witness for himself and for his co-defendant. (St. F. 30).

That the said C. C. Quackenbush for the State put in evidence impeaching the testimony of Elbert B. Lindsey a certain judgment of conviction in a felony case of said Elbert B. Lindsey (Ex. No. 3, St. F. 25) and also likewise put in evidence impeaching the testimony of E. R. Lindsey, a certain judgment of conviction on a felony charge (Ex. No. 5, St. F. 38) (Being the same judgments heretofore referred to as being annulled by the Supreme Court, but using them before they could be annulled).

That said judgments and convictions and each of them were procured by said C. C. Quackenbush by his own misconduct, in Case No. 11045 of Spokane County, Wash., No. 25867 of this Supreme Court.

That on January 1, 1936, the record on appeal in this case at bar was lodged in this Supreme Court, and in [fol. 91] appellants opening brief filed at that time at pp. 54, appellant said:

"It would seem to be beyond question that these sentences and commitments that were introduced were void."

This brief had already been served on the said prosecutor, before it was filed.

That on January 10, 1936, this same Supreme Court handed down its opinion in case No. 11045-25867 reversing and setting aside said convictions and judgments that had been used as exhibits, Nos. 3 and 5 to impeach the testimony of the defendants and their witnesses, the reason for reversal being "misconduct of the said C. C. Quackenbush" prosecutor, which misconduct the trial judge, Hon. E. V. Kuykendall, failed and refused to correct, although the matter was strenuously called to his attention by defendants at the time it was committed.

That said judgments and convictions, never have been re-instated, or the said cause re-tried, and the said convictions still remain in all respects annulled.

That said decision setting aside said convictions is found in Vol. 185 Washington Reports at page 206—Pac.— That also a certified copy of same is now on file as a supplemental transcript in this record, and the defendants have moved to introduce a certified copy of same in evidence before this

court, the only court now having jurisdiction at the present time.

That said decision of reversal was rendered by a part of the judges who are now sitting en banc in this case.

That on January 27, 1936, 17 days after the setting aside of said convictions, and with full knowledge that they had [fol. 92] been so set aside, the said Quackenbush, prosecutor, served, filed and presented to this court "respondent's brief", being the brief of the State of Washington in this case, in which he urged, on behalf of the State:

"Respondent respectfully submits that the judgment of the trial court should be sustained."

That this was done with full knowledge by the State of Washington, its officers and agents, that said judgment, and said conviction of defendants, and the condemning them and each of them to be deprived of their liberty for 15 years, had been procured by the State by "a mistake of law", if, indeed, it can be said it was not actually a deliberate fraud, perpetrated by the State; which "mistake of law" was not occasioned by any act of omission of defendants, or either of them, but occasioned solely through the actions of the State and its officers.

That appellants at once prepared, served on the prosecutor and filed their "reply" brief in which on pages 1, 2 and 3 this matter was fully brought to the attention of the court and the prosecutor, respondents saying therein, among other things:

"Counsel's silence on the subject, and their failure to answer such contention, knowing that the case in which the exhibits were issued has been reversed, must be taken as an admission that such error exists.

If counsel had a proper regard for the rights of an accused person he would unhesitatingly confess error • • •.

When the convictions were obtained by misconduct of counsel, and he thus obtained a so-called judgment, sentence and commitment, which he thought he could, and did, use as evidence in this case, and putting the same before the jury showing a somewhat similar offense, and a sentence to a long term in the penitentiary—although he must have known that the result would be that the case would be reversed and the proceedings nullified thus himself making false evidence to his knowledge, and manufactured by himself.

But at any rate, whatever his motives • • • the situation now exists • • • that the prosecutor put before the jury, wrongfully, the impression that the defendants were [fol. 93] guilty of some other crime, and had been sentenced to a long term of imprisonment, when the same turned out to be untrue, and of all of which he had ample warning • • •."

Thereafter appellants prepared, served and filed a supplemental reply brief, wherein this question was again taken up on pages 1 and 2, where it was said in regard to the introduction of the previous convictions:

This was wrong for several reasons, in the first place, the State should not be allowed to gamble with the liberty of its citizens—that is not the public policy of the State • • •.

The said exhibits 3 and 5, the judgments, sentences and commitments, never existed, as a matter of law and when the situation was cleared they had disappeared completely. And above all the whole situation was brought about, by the very person who sought to use his ill-gotten gains, to the prejudice and injury of these defendants.

The case was set down in this Supreme Court before a department for hearing on March 18, 1936, and argued by the prosecutor, and on or about May 1, 1936, appellants were notified that the case would be heard en banc on June 3, 1936—it was then put over by request of the prosecutor until June 29, 1936, and before the hearing on June 29, 1936, appellants filed an additional brief, wherein on pages 14 to 19 this matter was again taken up, and there it was said:

And it seems to us that one of the grave questions in this case is the question of the effect of the evidence and the exhibits introduced by the state over objection, as to the previous convictions of the defendants, and the fact that the case in which those convictions were obtained has now, since the trial of this case in the lower court, been reversed by this court, and those verdicts, judgments and sentences have been annulled, cancelled and set aside, so that in reality they never existed either in fact or in law.

That the case was argued by the prosecutor on June 29, 1936, and this Supreme Court of Washington, on August 20, 1936, in an opinion found in Vol. 87, Wash. Dec. pp. 298,

without in any manner mentioning the question here involved, and ignoring the same, entered its opinion and [fol. 94] order directing that the judgment of the Superior Court of Spokane, Wash., of Nov. 1, 1935, be carried out, and defendants imprisoned thereunder for a period of not more than 15 years each.

That this Supreme Court in all respects ignored, failed, neglected and refused to mention in its opinion or to take into consideration in any manner or render any opinion on the question presented, that is, that by reason of the change in conditions since the reversal of Case No. 11045-25867, and the setting aside of the convictions of the defendants which had been used for impeachment, that defendants are now and have been condemned in a trial in which they were in all substantial respects denied the right to testify in their own behalf, and denied the right to call witnesses to testify for them, all by reason of "a mistake in law" or "a fraud practiced by the State of Washington, by its officers and agents", and which is still being so practiced.

That neither of the defendants have ever been convicted of any crime or misdemeanor, save and except the one at bar, obtained in the manner herein set out, and the conviction in No. 11045-25867 which was by this court set aside.

E. R. Lindsey.

Subscribed and sworn to before me this 1st day of October, A. D. 1936. Alex Allardyce, Notary Public, State of Washington, residing at Spokane, Washington. (Seal.)

[fol. 95] IN SUPREME COURT OF WASHINGTON

NOTICE OF ORDER DENYING MOTION IN ARREST OF JUDGMENT, ETC.—Filed October 23, 1936

Mr. Ralph E. Foley, Mr. C. C. Quackenbush, Mr. E. R. Lindsey, Spokane, Washington.

DEAR SIRS:

#26004—Re State of Washington vs. Lindsey and Lindsey

Motion for arrest of judgment and motion re verdict, both motions denied.

(Motion Docket #8—p. 55.)

Yours very truly, Benj. T. Hart, Clerk.

[File endorsement omitted.]

[fol. 96] IN SUPREME COURT OF WASHINGTON

No. 26004

STATE OF WASHINGTON, Respondent,

vs.

E. R. LINDSEY and ELBERT R. LINDSEY, Appellants

Spokane County No. 11046

JUDGMENT—November 2, 1936

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Spokane County, and upon the argument of counsel, and the Court having fully considered the same, and being fully advised in the premises, it is now, on this 2nd day of November, A. D. 1936, on motion of Ralph E. Foley, Esquire, of counsel for respondent considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said State of Washington have and recover of and from the said E. R. Lindsey and Elbert R. Lindsey the costs of this action taxed and allowed at Seventy nine and 95/100 ($79.95) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Recorded and of record in Journal 33, page 246, records of the Supreme Court of Washington.

[fol. 97] IN SUPREME COURT OF WASHINGTON

]Title omitted[

MOTION OF DEFENDANTS FOR PERMISSION FOR SUPERIOR COURT OF SPOKANE COUNTY, WASHINGTON, TO RE-OPEN THIS CAUSE AND PROCEED IN SUCH MANNER AS IT DEEMS PROPER —Filed November 9, 1936

Comes now the defendants (Petitioners) and move this court for an order permitting the Superior Court of Spokane County, Washington, the trial court, to re-open the case, and judgment heretofore rendered by this Supreme

Court, dated Nov. 2, 1936, and filed in the Superior Court of Spokane County, Washington, Nov. 4, 1936, and for permission to the said Superior Court to proceed in such manner as it may deem proper, on the ground of newly discovered evidence, or a newly created situation, material to defendants, and which evidence and situation was not in existence at the time of trial, or at the time of motion for new trial or at any time while the jurisdiction of this cause was in the said trial, Superior Court, and which could not with reasonable dilligence have been discovered or foreseen by defendants.

And by reason of and by which defendants and each of them were denied a fair trial as guaranteed by the XIV amendment to the Constitution of the United States, and in contravention of the said Constitution and in contravention of the Constitution of the State of Washington, and in all substantial effect wrongfully and illegally deprived defendants, and each of them of their right to testify in their own defense, they so offering themselves, and denied them the right to call witnesses, by reason of what is sometimes called a mistake in law, for which the defendants, or [fol. 98] either of them, were in no way responsible, and for which the State of Washington, alone was responsible, in that at the time of trial defendants took the witness stand and called each other as witnesses, and that the State of Washington offered in evidence and read to the jury, and put in evidence, a certified copy of a previous conviction of each of the defendants of a felony charge, exhibits 3 and 5, in cause No. 11045 of the said Superior Court, No. 25867 of this Supreme Court, for the purpose of impeaching the testimony of the defendants and each of them, and it did have such effect; that thereafter and to-wit, on January 10, 1936, and after the jurisdiction of this case was in this Supreme Court, this Supreme Court reversed and set aside said judgment of conviction in said cause No. 11045-25867.

That it is very material for defendants and their right under the Constitution of the United States and of this State to be afforded an opportunity of presenting the fact before some court that said judgments so used for impeachment were set aside; that under the practice of this State the Superior Court, the trial court is the only court that can hear such evidence; that the said Superior Court is

without jurisdiction to do so unless such permission is granted by this court; that the final judgment has now been entered by this court, and returned to the Superior Court, and that it is but natural and proper justice that defendants be afforded an opportunity to present the facts above set out to the Superior Court of Spokane County, Washington, and that this court grant permission for such to be done.

This motion is based on the files and records and on the affidavit of E. R. Lindsey hereto attached.

E. R. Lindsey, for Petitioners.

[fol. 99] IN SUPREME COURT OF WASHINGTON

[Title omitted]

AFFIDAVIT OF E. R. LINDSEY IN SUPPORT OF MOTION FOR PERMISSION TO SUPERIOR COURT TO RE-OPEN CASE—Filed November 9, 1936

STATE OF WASHINGTON,
County of Spokane, ss:

E. R. Lindsey being first duly sworn upon oath deposes and says: That he is one of the defendants above named; that on the trial of this cause on Sept. 12-13, 1935, in the Superior Court of Spokane County, Washington, the defendants and each of them took the stand as witnesses and called each other as witnesses; that the State of Washington, for the purposes of impeaching the defendants and each of them introduced in evidence exhibits 3 and 5, being judgments of conviction of defendants and each of them in a felony case; being case No. 11045 of the Superior Court of Spokane County, Wash., and No. 25867 of this Supreme Court; that on said date the said case No. 25867 was on appeal to this court, and on Jan. 10, 1936, the said cause No. 11045-25867 was by this court reversed and the judgments and convictions held to have been illegally obtained by the misconduct of the Prosecuting Attorney for the State.

That by such action of the State the defendants were illegally and wrongfully impeached in their testimony by the use of the illegal judgments of conviction, and the defendants were in all substantial effect deprived of their right

to testify for themselves and to call witness- for their defense, in violation of their rights under the XIV amendment to the Constitution of the United States.

That defendants have no other way of introducing in evidence the fact of the reversal of said judgment except by permission of this court for the Superior Court to reopen the case, set aside the judgments and grant a new trial.

That the defendants are fully entitled to this under the rights guaranteed to them by the said XIV Amendment to the U. S. Constitution. That the fact of reversal is material to defendants and could not be procured at the time of trial.

E. R. Lindsey.

Subscribed and sworn to before me this 5th day of November, 1936. Lee S. Wood, Notary Public, State of Wash. (Seal.)

[File endorsement omitted.]

Copy received Nov. 5, 1936, Prosecuting Attorney, Spokane County, Wash.

[fol. 100] In Supreme Court of Washington

[Title omitted]

Additional Affidavit in Support of Motion for Permission to Superior Court of Spokane County to Re-Open Case and Proceed in Such Manner as It May Deem Proper, on the Ground of New Evidence—Filed November 12, 1936

State of Washington,
County of Spokane, ss:

E. R. Lindsey being first duly sworn on oath deposes and says: That he is one of the defendants above named, and makes this further affidavit in support of the motion of defendants for leave for Superior Court to proceed further in the case, after judgment in the Supreme Court.

And affiant further states that on Sept. 12-13, 1935, at the time of the trial of this cause in the Superior Court of Spokane County, Washington, in the case in which the

judgment was rendered and conviction had against the defendants and each of them, the following proceedings were had:

"Elbert B. Lindsey, called as a witness by the defense, was sworn and testified:

Cross examination.

By Mr. Quackenbush:

State's exhibit No. 3 marked for identification.

Q. Have you ever been convicted?

Mr. Donovan: I object. There is pending in the Supreme Court an appeal from the matter he is inquiring about, and while the question of appeal is pending it is improper at this time to attempt to use a conviction in the Superior Court when the case is pending on appeal and the conviction will not be complete until the Supreme Court has passed upon the question involved.

The Court: Objection overruled.

Mr. Donovan: Exception.

Q. I hand you state's exhibit No. 3 for identification and ask you if you are the party referred to in that instrument?

A. Yes, I am.

Mr. Quackenbush: I offer state's exhibit No. 3 in evidence.

Mr. Donovan: Same objection.

[fol. 101] The Court: Objection over-ruled.

Mr. Donovan: Exception.

(State's exhibit No. 3, commitment of Elbert B. Lindsey received in evidence and marked.)

Mr. Quackenbush: Reads said exhibit in full to the jury.

(Said exhibit so read being in words and figures as follows:)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

Case No. 11045

STATE OF WASHINGTON, Plaintiff,

vs.

ELBERT B. LINDSEY, Defendant

Judgment, Sentence and Commitment upon Verdict of Guilty

Reformatory

On this 10*ty* day of July 1935, the above defendant came into open court for pronouncement of judgment and sentence, and being asked by the court if he had any legal cause to show why judgment of this court should not be pronounced in his case he made his statement, the defendant being represented by E. R. Lindsey and L. J. Birdseye, his counsel.

Thereupon, it is now by the court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of attempted grand larceny, as to Count I, as charged in said information, that the defendant now before the Court is guilty and it is now by the court considered, Ordered Adjudged and Decreed, that the said defendant Elbert B. Lindsey be punished by confinement at hard labor in the Washington State Reformatory, for a term of not more than 7½ years (Seven and one half years) and shall pay the costs of this prosecution taxed at $51.95. That said defendant shall stand committed to said institution until this sentence is complied with.

It is the further order of the court that——

That said defendant is hereby remanded to the custody of the Sheriff of • • • said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in said institution.

Done in open court in the presence of the said defendant this 10th day of July, 1935.

E. V. Kuykendall, Judge.

Filed Jul. 10, 1935, Frank C. Nash, Clerk.

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington for Spokane County, do hereby certify that the foregoing is a full true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open court while the defendant was personally present.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 10th day of July, 1935.

Frank C. Nash, Clerk, Nels Poulsen, Deputy. (Seal.)

[fol. 102] That thereafter the following proceedings were had in the Supreme Court of the State of Washington.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON, JANUARY SESSION, A. D. 1936

Be it Remembered, That at a regular session of the Supreme Court of the State of Washington, begun and holden at Olympia on the 2nd Monday of January, A. D., 1936, it being the thirteenth day of said month, among other • • • the following was had and done, to-wit:

Tuesday, February 11, 1936.

No. 25867. Spokane County No. 11045

STATE OF WASHINGTON, Respondent,

vs.

E. R. LINDSEY and ELBERT B. LINDSEY, Appellants

Judgment

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Spokane County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 11th day of February, A. D., 1936, on motion of E. R. Lindsey, Esquire, of counsel for appellants, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the

same is, hereby reversed and the cause remanded with directions to grant appellants a new trial and that the said E. R. Lindsey and Elbert B. Lindsey have and recover of and from the state of Washington the costs of this action taxed and allowed at Fifty-nine and 25-100 ($59.25), and that execution issue therefor. And it is further ordered that this cause be remitted to the Superior Court for further proceedings in accordance herewith.

I, Benj. J. Hart, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is a true copy of the judgment and decree in said cause, as the same now remains of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 11th day of February, A. D. 1935.

Benj. J. Hart, Clerk of the Supreme Court, State of Washington. (Seal.)

Filed Feb. 13, 1936. Frank C. Nash, Clerk.

That further on said 12-13 days of Sept. 1935, in the said court and cause, as hereinbefore set out, viz: the Superior Court of the State of Washington for Spokane County, the following proceedings as to E. R. Lindsey were had:

[fol. 103] E. R. Lindsey, one of the defendants, called on behalf of the defense, was sworn, and testified:

Cross-examination.

By Mr. Quackenbush:

Q. I hand you a paper marked State's exhibit No. 5 for identification and ask you if you are the party referred to in that instrument?

A. I assume I am; that is my name.

Mr. Carlson: I object as incompetent, irrelevant and immaterial.

Overruled. Exception.

Mr. Quackenbush: I offer State's exhibit No. 5 in evidence.

Mr. Donovan: We object as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Exception.

(State's exhibit No. 5 admitted in evidence, being a commitment of E. R. Lindsey.)

Mr. Quackenbush read the exhibit to the jury.

(Said exhibit No. 5 being in words and figures as follows:)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

No. 11045

STATE OF WASHINGTON, Plaintiff,

vs.

E. R. LINDSEY, Defendant

Judgment, Sentence and Commitment Upon Verdict of Guilty

Penitentiary

On this 10th day of July, 1935, the above defendant came into open court for pronouncement of judgment and sentence, and being asked by the court if he had any legal cause to show why judgment of this court should not be pronounced in his case he made his statement, the defendant being represented by E. R. Lindsey and L. J. Birdseye, his counsel.

Thereupon, It is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Attempted Grand Larceny, as to Count I, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered Ordered Adjudged and Decreed, that the said defendant be punished by confinement at hard labor in the Washington State Penitentiary, for a period of not more than 7½ years (seven and one half years) and shall pay the costs of this prosecution taxed at $51.95. That said defendant shall stand committed to said institution until this sentence is complied with.

It is further order of the court ——.

That said defendant is h-reby remanded to the custody of the Sheriff of said County to be detained and delivered

into the custody of the proper officers for transportation to, and confinement in said institution.

Done in open court in the presence of the said defendant, this 10th day of July, 1935.

E. V. Kuykendall, Judge.

Filed Jul. 10, 1935. Frank C. Nash, Clerk.

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County and [fol. 104] ex-officio Clerk of the Superior Court of the State of Washington, for Spokane County, do hereby certify that the foregoing is a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open court while the defendant was personally present.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said court this 10th day of July, 1935.

Frank C. Nash, Clerk, Nels Paulsen Deputy. (Seal.)

That said judgment, sentence and commitment were in all respects set aside and annulled and reversed by the judgment of the Supreme Court of the State of Washington in Case No. 25867, of date February 11, 1936, as set forth in haec verba, supra, in this affidavit.

That the judgments, sentences and commitments, exhibits 3 and 5 of the State had heretofore been procured by the acts of the State of Washington, plaintiff herein.

That they were introduced for the purpose of impeaching the defendants and each of them, and did so impeach the defendants.

That they were introduced and put before the jury by the State of Washington and by the Court on the theory of law that they were valid and subsisting judgments, which they purported to be on their face.

That this theory of law indulged in by the Court at the time of their admission was a mistaken theory, in other words, the introduction of said exhibits was "a mistake of law", for which the defendants or either of them were in no way responsible, but a Mistake of law for which the State of Washington, plaintiff, alone was responsible.

That the State of Washington being the "actor" in this

[fol. 105] proceedings, and this mistake of law being the mistake of the state alone, defendants are entitled under their constitutional guaranty contained in the XIV amendment to the constitution of the United States, and under the Constitutional guaranty-s of the Constitution of the State of Washington, to an opportunity to present this mistake of law to some judicial tribunal in the course of this proceeding.

That as the Supreme Court of the State is not a tribunal empowered to hear and receive evidence in this state, and as the Superior Court is such a tribunal, the defendants are entitled as a matter of right and fundamental justice to have the jurisdiction transferred back to the Superior Court, where they may be afforded an opportunity to present the evidence of the fact of the reversal of the judgments, sentences and commitments, in evidence, and be accorded a fair and impartial trial where no constitutional or legal rights are denied them. That up to this time, and without such leave to the Superior Court, defendants will continue to be so denied their constitutional rights.

E. R. Lindsey.

Subscribed and sworn to before me this 9th day of November, 1936. Alex Allardyce, Notary Public, State of Washington, residing at Spokane, Wash. (Seal.)

[File endorsement omitted.]

Copy received Nov. 9, 1936, Prosecuting Attorney, Spokane County, Wash.

[fol. 106] In Supreme Court of Washington

Notice of Order Denying Motion to Re-Open Case—Filed November 27, 1936

Mr. Ralph E. Foley, Mr. C. C. Quackenbush, Mr. E. R. Lindsey, Spokane, Washington.

Dear Sirs:

No. 26004—Re State of Washington vs. Lindsey and Lindsey

Motion to re-open case is denied.

(Motion Book #8—page 63.)

Yours very truly, Ben. T. Hart, Clerk.

[File endorsement omitted.]

[fol. 107] IN SUPREME COURT OF WASHINGTON
En Banc. No. 26004

THE STATE OF WASHINGTON, Respondent,

v.

ELBERT B. LINDSEY and E. R. LINDSEY, Appellants

OPINION—Filed August 20, 1936.

This appeal is from a judgment and sentence upon a verdict of conviction.

On September 4, 1935, an information was filed in the office of the clerk of the superior court of Spokane county, charging defendants with the crime of grand larceny, as follows:

"That the said defendants, Elbert B. Lindsey, and E. R. Lindsey, in the County of Spokane, State of Washington, on or about the 15th day of April, 1935, then and there being, did then and there wilfully, unlawfully, feloniously and fraudulently, by color and aid of a check in words and figures as follows, to-wit:

'Spokane, Wash. Apl 15 1935. No. 2.

Spokane and Eastern Trust Company

Pay to the order of Elbert B. Lindsey, $40.00
Forty 00/ Dollars
E. R. Lindsey'

and endorsed on the back thereof: 'Elbert B. Lindsey, 1104½ W. 2nd Ave Co Service National Guard'
obtain from Peter M. Jacoy Forty dollars ($40.00) in money and currency of the United States of America, of the value of Forty Dollars, and the property of the said Peter M. Jacoy, with intent to deprive and defraud the said Peter M. Jacoy, the owner thereof, the said defendants then and there knowing that the maker and drawer of said check was not authorized or entitled to make or draw the same."

This information was designated as the "(2nd) Substituted Information," the first having been filed on May 3, 1935, but substituted by another on August 17, 1935, which in turn was again substituted by the one first above mentioned. Demurrers, motions to set aside the information, motions for separate trials and for bill of particulars were

[fol. 107-a] all either overruled or denied. Each defendant entered pleas of "not guilty" and "former jeopardy by reason of a valid information in the same cause having been heretofore dismissed under such circumstances as to constitute a bar of another prosecution for the same offense."

The record discloses that at the outset of the trial each defendant was represented by counsel, but the defendant Elbert B. Lindsey objected to proceeding with the trial because he was unable to employ counsel and as counsel had just then been appointed for him and he had had no time to consult with his counsel or prepare his case, which objection was overruled. E. R. Lindsey objected to the introduction of any evidence on the ground that the information does not state a cause of action as to him. At the conclusion of the state's case motions to dismiss were denied, and at the conclusion of all the evidence, motions to dismiss or in the alternative to direct the jury to return verdicts of "not guilty" were also denied. Upon the return of the verdict of "guilty", each defendant on September 16, 1935, filed motions in arrest of judgment and for a new trial. On November 1, the court entered its judgment, sentence and commitment upon the verdict and four days later on November 5, each defendant gave notice of appeal. Thereafter a motion was made by one of the defendants to reopen the case on the motion for a new trial and in arrest of judgment or to set aside the verdict, judgment and sentence.

The court journal, under date of November 18, has the notation:

"Oral order of November 1st, 1935, denying motion for new trial. Order signed by court, November 18th, 1935. • • •

"Order denying motion to re-open and motion for new trial denied. Motion to arrest judgment denied, or to set aside verdict judgment and sentence as to him being void denied."

[fol. 108] On the same day the court entered two written orders, one denying motion to re-open the case on motion for new trial and arrest of judgment on the ground that the court had no jurisdiction, the defendants having given notice of appeal, and the other on the motion for a new trial recites that the motion and argument were heard on November 1, 1935, the court having made oral decision that such motion was denied and judgment entered, it was ordered

"that said motion for new trial be, and the same is hereby denied and entered, as of November 1, 1935."

Many errors are assigned but we feel that all except those which we will hereinafter discuss are without merit and it would serve no useful purpose to extend this opinion to discuss them all.

The first assignment is directed to the overruling of objections to the admission in evidence of statements attributed to one of the defendants in the presence of police officers while, as it is claimed, such defendant was held in custody and the statements were made under duress, all in violation of the constitutions of the United States and of this state.

From the evidence it cannot be said that as a matter of law there was duress, but in any event Rem. Rev. Stat., §2151, provides:

"The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony."

Certainly, the record discloses much corroborating evidence to sustain the admissibility of the written admissions.

Appellants argue at length upon the court's refusal to dismiss or direct a verdict of acquittal because of the discrepancy between the number of the check stated in the information and the number on the check introduced in evi- [fol. 109] dence upon which the convictions were obtained. This check was designated in the information as No. 2, while actually the number upon it was 21. This does not amount to a variance at law inasmuch as it is not of a material nature and neither one of the defendants was prejudiced nor the jury misled thereby. State v. Fairfield, 140 Wash. 349, 248 Pac. 810.

The contentions that the evidence fails to show intent to defraud or knowledge that there were no funds in the bank to meet the check is sufficiently answered by saying that there was evidence directly upon the question of knowledge and the intent is for the jury to determine from all of the facts and circumstances.

The assignment as to the evidence of other crimes is gov-

erned by our decisions in State v. Johnson, 141 Wash. 324, 251 Pac. 589, and State v. Martin, 176 Wash. 637, 30 P. (2d) 660.

The contention that the information was subject to demurrer or appellants were entitled to a bill of particulars is answered by State v. Price, 173 Wash. 108, 21 P. (2d) 1038.

Appellants claim that under the circumstances of this case they had already been placed in jeopardy by the abandonment of the earlier informations by the filing of the second substituted information. The contention is invalid. In State v. Navone, 180 Wash. 121, 39 P. (2d) 384, we said:

"We find no merit in appellant's assignments of error based upon the filing of the second information and appellant's trial thereon. The second information was filed in the same proceeding as the first, and manifestly superseded the same. If the state should attempt to bring appellant to trial upon the first information, an appropriate remedy would doubtless be available to him .

"Neither do we find error in connection with the refusal of the trial court to require the state to elect as to upon which information it would proceed. Appellant was placed upon his trial upon the second information. He does not argue that he was surprised by this action, and we find no basis for his contention that he was prejudiced by the ruling of the trial court in connection with the matters above referred to."

[fol. 110] The trial court is criticized because of its instructions relative to Rem. Rev. Stat., § 2601 (2) and § 2601-2. Each of these sections define a crime by the fraudulent issuance or passage of a check. The acts of the defendants complained of in the information constituting, as they did, but one transaction which involved both of these men it was proper for the court, where, as in this case, there were two statutes, one or both of which might have been violated, to instruct the jury as to both laws.

A number of assignments deal with the sentence. At the time the crime was committed on April 15, 1935, the law provided that the court fix the penalty at not more than fifteen years imprisonment (Rem. Rev. Stat., § 2605), and the minimum of not less than six months nor more than five years (Rem. Rev. Stat., § 2281). At the time of the trial, however, a new law had come into existence (Ch. 114, Laws

1935, Rem. Rev. Stat., § 10249, et seq.), which created a "board of prison, terms and paroles" and provided, among other things, (§ 10249-2):

"When a person is convicted of any felony • • • the court shall sentence such person to the penitentiary, or • • • to the reformatory, and shall fix the maximum term of such person's sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, • • •

"Within six (6) months after the admission of such convicted person to the penitentiary or the reformatory • • • the board • • • shall fix the duration of his or her confinement • • •."

It is claimed by appellant that this is an ex post facto law and, therefore, violative of Art. I, § 10, of the United States Constitution which, among other things, prohibits a state from passing such a law.

In Malloy v. South Carolina, 237 U. S. 180, it was held that the constitutional inhibition on ex post facto laws was intended to secure substantial personal rights against arbi- [fol. 111] trary and oppressive legislative action and not to obstruct mere alterations in conditions deemed necessary for the orderly infliction of humane punishment, citing Rooney v. North Dakota, 196 U. S. 319. It was further held that a law is not ex post facto within the constitutional prohibition that mollifies the rigor of the criminal law; but only those laws that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction fall within the prohibition, citing and quoting Calder v. Bull, 3 Dall. 386.

The amending act does not change or inflict a greater punishment than the law in force when the alleged crime was committed for the court could under the law in force at that time pronounce a maximum sentence of not more than fifteen years. The minimum and maximum punishments remain the same as before the enactment of the act of 1935. To the same effect upon this amendment to our parole law, see Andrus v. McCauley, et al, as yet unreported, in the District Court for the Eastern District of Washington, by Kavanaugh, District Judge, filed August —, 1936.

We are obliged to conclude that chapter 114, Laws of 1935, does not violate the prohibition contained in the Fed-

eral constitution regarding the passage of ex post facto laws.

We find no prejudicial error in the trial of the case and the judgment is affirmed.

Holcomb, J. Blake, J. Beals, J. Steinert, J. Geraghty, J.

We concur: Millard, C. J. Mitchell, J. Tolman, J. Main, J.

[fol. 112] In Supreme Court of Washington

Amended Præcipe—Filed December 23, 1936

Honorable Benj. T. Hart, Clerk of the Supreme Court, Olympia, Wash.

Sir:

In Re State of Washington, plaintiff, vs. Elbert B. Lindsey and E. R. Lindsey, defendants, No. 11046 of the Superior Court of Spokane County, No. 26004 of the Supreme Court of Washington

Please verify and certify under seal of your court the following files and records in the above entitled cause, for use of petition of Writ of Certiorari in the Supreme Court of the United States, a copy of which is herewith tendered you for such certification, together with your fee for same, and when so certified please return to us at the above address:

1. 2nd Substitute information.
2. Transcript of the evidence in the trial court, called in the State of Washington, a "Statement of Facts."
3, 4, 5 and 6—Exhibits 1, 2, 3 and 5.
7. Instructions to trial jury.
8. Verdict of the jury.
9. Judgments (two) fixing the term of sentences.
10. (15 pages) so much of defendants assignments of error filed on appeal in the Supreme Court of Washington as appear herein.
11. Notice of Supreme Court of affirmance.
12. Motion in Supreme Court for arrest of judgment on the grounds that defendants were denied the right to testify.
13. Affidavit in support of said motion.
14. Notice of overruling motion in arrest of judgment.
15. Remittitur of Supreme Court.

16. Motion of defendants for permission to Superior Court to re-open case.
17. Affidavit in support of same.
18. Additional affidavit for same.
19. Notice of denial of said motion to re-open.
20. Præcipe for certification.
21. Certificate to transcript.

Opinion of State Supreme Court.
(The assignments of error, extracts, will appear in the transcript as pages 65 to 79.)

Assignments already served.

Very respectfully, E. R. Lindsey. Elbert B. Lindsey.

Received copy this 18th day of Dec. 1936.
C. C. Quackenbush, Prosecuting Attorney, Spokane County, Attorney for State of Wash. H. E.

[File endorsement omitted.]

[fol. 113]

1104½ W. 2nd Avenue,
Spokane, Wash., Dec. 10, 1935.

Ralph E. Foley, Esq., Prosecuting Attorney, Spokane County, Wash.

SIR:

In re State of Washington, Plaintiff vs. Elbert B. Lindsey and E. R. Lindsey, Defendants, No. 11046 of Superior Court, No. 26004 of Supreme Court

The defendants, Elbert B. Lindsey and E. R. Lindsey herewith serve upon you a praecipe directed to the Clerk of the Supreme Court of the State of Washington, to certify under seal the documents and records therein listed and named, which record when so certified the defendants will use in their application to the Supreme Court of the United States for a writ of certiorari directed to said Supreme Court of Washington. And defendants also herewith serve upon you, copies of pages 78 to 92 inclusive of said record being the parts of the Assignments of error used in the Supreme Court of Washington, which defendants intend to present to the Supreme Court of the United States.

E. R. Lindsey. Elbert B. Lindsey.

Received copy of said praecipe and said pages 78 to 92 inclusive, this 10th day of December, 1936.

C. C. Quackenbush, Deputy Prosecuting Attorney, Spokane County, Washington, Attorney for State of Washington.

[File endorsement omitted.]

[fol. 114] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: In forma pauperis. Enter Elbert B. and E. R. Lindsey, pro se. File No. 41,200. Washington Supreme Court. Term No. 660. Elbert B. Lindsey and E. R. Lindsey, petitioners, vs. State of Washington. Petition for a writ of certiorari and exhibit thereto. Filed January 16, 1937. Term No. 660, O. T., 1936.

[fol. 115] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 5, 1937

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted, limited to the question as to whether Chapter 114 of the Laws of Washington of 1935, as here applied, is invalid as an ex post facto law within the meaning of Art. 1, Sec. 9, par. 3, of the Constitution. The case is assigned for hearing on Monday, May 3, 1937.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.